82-1135

Supreme Court, U.S.
FILED
JAN 6 1983
ALEXANDER L. STEVAS
CLERK

NO. 81_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Petitioner

QUESTIONS PRESENTED

WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF REPRESENTATION, DOES THE LIMITED PARTICIPATION OF STANDBY COUNSEL ABROGATE HIS EXERCISE OF THE RIGHT, ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF?

HAS THE FIFTH CIRCUIT EXTENDED *FARETTA V. CALIFORNIA* BY PRESUMING PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. Course of Proceedings and Disposition Below 2

B. Statement of the Facts 4

REASONS FOR GRANTING THE WRIT 6

I. There are Special and Important Reasons for Granting the Writ 6

II. Where a Defendant Invokes his *Faretta v. California* Right of Self Representation, the Limited Participation of Standby Counsel does not Abrogate his exercise of the Right Entitling him to Federal Habeas Corpus Relief 7

III. The Fifth Circuit has Extended *Faretta v. California* by Establishing a Presumption of Prejudice Where Standby Counsel Assists a *Pro Se* Defendant, even though the Defendant had a Genuine Opportunity to Represent himself 11

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	Page
Brown v. Wainwright, 665 F.2d 607 (5th Cir. 1982)	13
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)	9,11
Cuyler v. Sullivan, 446 U.S. 335, (1980)	9
Faretta v. California, 422 U.S. 806, (1975)	*passim*
Jackson v. Denno, 378 U.S. 368, (1964)	10
United States v. Frady, __U.S.__ 102 S.Ct. 1584 (1982)	11
Wiggins v. State, 520 S.W.2d 780 (Tex.Crim.App. 1975)	3

NO. 81_____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Fifth Circuit, entered in this case on July 26, 1982, rehearing *en banc* denied on November 8, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 581 F.2d 266, *reh. denied*, 591 F.2d 213 (5th Cir. 1982). (Appendices A and B). The report and recommendation of the United States Magistrate, adopted by the district court, appears as Appendix C.

JURISDICTION

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. A timely filed petition for rehearing *en banc* was denied on November 8, 1982. This petition for certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . and to have the Assistance of Counsel for his defense.

United States Constitution, art. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Petitioner has custody of Respondent pursuant to a judgement and sentence of the 187th Judicial District Court of Bexar County, Texas. In January, 1973, Respondent originally was tried and found guilty of the offense of robbery, and his punishment was assessed at

life imprisonment. On March 21, 1973, however, this conviction was set aside and new trial was ordered due to a defective indictment. Respondent was reindicted for the robbery and trial in this cause began on June 4, 1973. At trial, Respondent asserted his desire to waive the assistance of counsel and to conduct his own defense. The trial court granted him the right to do so, but kept two appointed attorneys as standby counsel. On June 8, 1973, Respondent was found guilty of the offense. Punishment again was assessed at life imprisonment.

Respondent appealed to the Texas Court of Criminal Appeals and expressed his desire to waive appellate counsel and represent himself on appeal. Several months later, however, he requested the appointment of counsel. Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty page appellate brief. The Texas Court of Criminal Appeals affirmed the conviction on March 26, 1975, in *Wiggins v. State*, 520 S.W.2d 780 (Tex.Crim.App. 1975).

Respondent then filed in the state courts five applications for habeas corpus relief and hundreds of pages of various pleadings in the state courts. Respondent also has filed several prior applications for federal habeas corpus relief. A petition for writ of certiorari was denied by this Court on November 13, 1978.

In the instant cause Respondent applied to the United States district court again seeking federal habeas corpus relief in *Wiggins v. Estelle*, No. SA-79-CA-128. On August 26, 1980, the district court entered an order adopting the findings and recommendations of the Magistrate and denying habeas corpus relief. The opinion of a panel of the United States Court of Appeals for the Fifth Circuit, reversing the decision of the district court and ordering that habeas relief be granted, was handed down on July 26, 1982; rehearing *en banc* was

denied on November 8, 1982, with five judges dissenting. *Wiggins v. Estelle*, 581 F.2d 266 (5th Cir. 1982), *reh denied* 591 F.2d 213 (5th Cir. 1982).

B. STATEMENT OF THE FACTS

On April 16, 1973, Respondent filed a request for appointed counsel prior to his second trial, specifically stating that he wished to rescind his earlier waiver of counsel. On April 17, 1973, the trial court entered an order appointing counsel. Thereafter, Respondent continued to act in his own behalf. He filed a motion for a transcript of his prior trial, a motion to suppress the identification of the complaining witness, motions for witness fees and subpoenas, requests for a speedy trial and a change of venue, and a writ of habeas corpus. On May 26, 1973, however, he filed an additional request for counsel. On May 31, 1973, the trial court appointed additional counsel, R. Norvell Graham, to assist Respondent. Nevertheless, Respondent continued to act in his own behalf, filing a motion for special relief, a motion in limine, a bill of exceptions and another special plea, and a motion for a jury shuffle.

Pre-trial hearings began on June 4, 1973. Respondent, against the advice of one of the attorneys, announced ready for trial. Conflict arose between Respondent and the attorneys on this matter, and the trial court stated for the record that Respondent was exercising his right to represent himself and that the attorneys were appointed as standby counsel to consult with him when he so desired or when the trial court directed him to do so. Thereafter, the court began consideration of Respondent's *pro se* motions. During a lengthy discussion concerning discovery, counsel voiced a few requests for particular discovery, and argued in support of them, to which action Respondent made no objection. At one point, Respondent halted the discussion and asserted his desire to proceed *pro se*. He was instructed that he

might be required to consult with counsel on occasion. Additional motions were then presented by Respondent, and he personally conducted the examination of a witness concerning one of the motions. Four times during the examination Graham assisted Respondent; no objection was made at any time to Graham's actions, and, at least once, Respondent specifically *approved* counsel's actions. Thereafter, Respondent argued additional motions.

Pre-trial hearings continued on the morning of June 5, 1973. The trial court refused to dismiss the standby attorneys and refused to enter a specific order restraining the actions of counsel; rather, the court determined to take up individually any problems which arose between Respondent and counsel. Additional *pro se* motions were then made and argued by Respondent.

The first jury panel was instructed that Respondent was exercising his right of self-representation, and that standby counsel was appointed to assist him. At one point in the proceedings, the trial court erroneously informed the panel that Petitioner was being tried as a repeat offender; counsel objected to this, and moved for a mistrial, and Respondent specifically agreed. The panel subsequently was quashed. The second panel was instructed as to Respondent's election to represent himself, and Respondent made his opening statement to the panel. Thereafter, Respondent conducted the *voir dire* examination for the defense *entirely* without assistance or interference from counsel. Thereafter, the jury was sworn and testimony began. Thus, the jury which tried Respondent was examined and selected by Respondent alone.

During all trial proceedings, Respondent examined and cross-examined witnesses, made objections to evidence and arguments, chose which defensive theories and witnesses he would present before the court, and argued his case to the jury at both states of the bifur-

cated trial. During portions of the trial, Respondent *accepted* the assistance and aid of his standby counsel; during other portions he totally rejected any action taken on his behalf. While Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this actions provoked no complaint or objection by Respondent. Moreover, on various occasions, Respondent specifically *adopted* counsel's objections. During other portions of the trial, *both* Respondent and counsel made objections and argued the same matters, cross-examined the witnesses, and argued to the jury.

Several times during the trial, a conflict arose between Respondent and standby counsel as to matters involving trial strategy. Each time, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and *sustained Petitioner's position.* At various other times, when counsel indicated that he wanted to interject matters into the proceedings, the trial court specifically inquired as to whether counsel had Petitioner's permission to do so.

REASONS FOR GRANTING THE WRIT

I.
THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

The Court of Appeals for the Fifth Circuit has decided an important question of federal law which has not been,but should be, settled by this Court. The issue presented by this case is one of first impression, apparently in any jurisdiction, and concerns the question of whether a criminal defendant's rights under *Faretta v. California*, 422 U.S. 806 (1975) are violated when standby counsel intermittently offers his assistance during the trial. The court below held that such assistance

wholly abrogated the defendant's exercise of his right of self-representation and that federal habeas corpus relief was mandated by the Sixth Amendment. As was stated by the judges dissenting to the denial of rehearing *en banc*, the rule that standby counsel is "to be seen and not heard" and the presumption of prejudice established where standby counsel offers assistance, "defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket." Since this decision represents an unwarranted extension of the principle established by this Court in *Faretta*, this Court should grant the writ to review the lower court's decision.

II.
WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF-REPRESENTATION, THE LIMITED PARTICIPATION OF STANDBY COUNSEL DOES NOT ABROGATE HIS EXERCISE OF THE RIGHT ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF

This case presents questions of first impression, previously addressed neither in the Fifth Circuit nor, apparently, in any other. In *Faretta v. California*, 422 U.S. 806, (1975), this Court recognized the constitutional right of an accused to dispense with the assistance of counsel and conduct his own defense, since the right to defend is personal and since the accused ultimately must bear the consequences of a conviction. The Respondent in the instant case, tried in 1973, requested and received his right of self-representation. Standby counsel, however, participated to a limited extent, sometimes at Respondent's request, sometimes with his acquiescence and sometimes objectionably to him. The record as a whole reflects, however, that Respondent acted in the capacity of his own counsel, controlling, managing and presenting his defense before the jury. Most discussions as to strategy between Respon-

dent and his standby counsel occurred out of the jury's presence. Each time there was any conflict between Respondent and standby counsel, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and sustained Respondent's position.

Thus, the record as a whole conclusively demonstrates that Respondent acted as his own counsel and actually controlled the conduct of the proceedings at trial. His personal decisions in proceeding to trial, examining and selecting the jury panel, making an opening statement, cross-examining the State's witnesses, selecting his defensive theory and deciding which witnesses to present, examining his own witnesses, making objections to evidence and arguing points of law to the court, and arguing his case to the jury, clearly show that he managed and controlled his own defense within the meaning of *Faretta*.

The essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity to participate personally in the trial of the case before the finders of facts. This Respondent clearly did. The record supports findings that Respondent, in exercising virtually exclusive management over the trial on the merits, was allowed the right to represent himself.

Nevertheless, the panel opinion held:

> . . . the rule that we establish today is that court-appointed standby counsel is "to be seen, but not heard"

681 F.2d at 273, and found that the limited participation of counsel completely abrogated Respondent's exercise of his right of self-representation.

First, the standard of review should be not whether standby counsel interjected himself into the trial proceedings in any way, but rather should focus on whether the *pro se* defendant was afforded a *genuine opportunity* to conduct his defense. Petitioner urges that *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) sets out the appropriate standard of review; *i.e.*, whether a *pro se* defendant has been afforded a *genuine opportunity* to conduct his defense. While the lower court's opinion noted this language in *Chapman*, nowhere did it discuss whether Respondent had such a "genuine opportunity," or the applicability of this suggested standard of review. The test adopted in that opinion, that *any* interjection of standby counsel constitutes federal constitutional error, should be rejected.[1]

In addition, the test adopted by the lower court establishes a rule which would totally bind the hands of a trial judge confronted with a defendant exercising his *Faretta* right. Under this test, standby counsel would be absolutely prohibited from speaking up in the *pro se* defendant's behalf, no matter what the circumstances, unless the defendant requested him to do so.

This rigid and unbending rule would not serve the interests of justice. In *Cuyler v. Sullivan*, 446 U.S. 335, (1980), this Court iterated that:

> . . . a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment (citations omitted) . . .

---

1 . The opinion correctly pointed out that the application of this rigid test could result in defense counsel "sandbagging" the prosecution. 681 F.2d at 274.

446 U.S. at 343. This Court continued, that when the state obtains a criminal conviction through a trial in which procedural and substantive safeguards are denied, it is the state that unconstitutionally deprives the defendant of his liberty, since the "[s]tate's conduct of a criminal trial itself implicates the state in the defendant's conviction." 446 U.S. at 344-45. Thus, the state, too, has a strong interest in obtaining lawful criminal convictions.

To require the trial court and standby counsel to remain mute thoughout the proceedings, no matter what transpires, which is the ultimate result dictated by the lower court's opinion, may be detrimental to the interests of the defendant and the state in ensuring fundamental fairness in criminal proceedings.[2] While the state's interest certainly may not supersede a defendant's interest in exclusive management of his trial, that interest at least should be considered in determining whether a rigid test for constitutional error should be established, or whether the proceedings should be reviewed on a case by case basis.[3]

---

2. Moreover, the lower court strongly implied that the trial court should have ordered standby counsel to remain mute, rather than determining to take up problems on an individual basis.

3. *E.g.*: Under the test established by the panel opinion, if standby counsel heard evidence that the *pro se* defendant's confession might have been involuntary and brought that to the attention of the trial court, which then conducted a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing and suppressed the confession, this action of counsel would constitute error of constitutional dimension. Further, pursuant to the standard adopted in the panel opinion, it would constitute *harmful* constitutional error, entitling the defendant to federal habeas relief, since the request was at odds with the defendant's wishes and certainly contravened the interests of the defendant as set out in the lower court's opinion.

Petitioner urges this Court to overrule this rigid test for constitutional error, *i.e.*, whether standby counsel has been heard as well as seen, and to establish a standard of review which inquires into the *pro se* defendant's genuine opportunity to manage, control and conduct his defense at trial.

III.

THE FIFTH CIRCUIT HAS EXTENDED *FARETTA V. CALIFORNIA* BY ESTABLISHING A PRESUMPTION OF PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF.

The lower court's rigid review of standby counsel's conduct and the presumption of prejudice established are unwarranted. As noted by the opinion:

> [t]he *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 553 F.2d at 891 n.9.

681 F.2d at 274, n.26. The Court subsequently, however, found that speculation as to actual harm suffered by the Respondent through standby counsel's conduct was unnecessary, as it found that a presumption of prejudice would be applied wherever a standby attorney is 'heard as well as seen.' Petitioner urges that a presumption of prejudice in these situations is unwarranted. *See e.g., United States v. Frady*, ____U.S.____, 102. S.Ct. 1584 (1982).

In addition, the lower court noted that while:

> [i]nterjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their

> presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned.

681 F.2d at 274, n. 27.

There is no basis for assuming that any comment made by standby counsel in the presence of the jury is inherently prejudicial to a defendant's exercise of his right of self-representation. Neither is this presumption mandated by *Faretta;* rather, it represents an unwarranted extension of *Faretta,* and grants to a *pro se* defendant the constitutional right to be free of any utterance by his standby counsel, with a presumption of harm if he is not. Surely this broad construction of *Faretta* was not intended by this Court. Further, the lower court's findings that discussions with or statements by standby counsel out of the presence of the jury "are not to be disregarded" because the defendant may become "frustrated or flustered," effectively tie the hands of both the trial court and counsel, for fear of later claims by a defendant that discussions of law or strategy "upset" him.

In addition, the lower court's opinion appears internally inconsistent, which could result in much confusion to bench and bar. The opinion notes:

> . . . in the interest of justice, the court or standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on its own or after being asked by standby counsel, may *request* that the accused confer with counsel . . .

681 F.2d at 273, n.24. Yet in its discussion of the presumption of prejudice arising when standby counsel speaks, the lower court found that these discussions "are not to be discounted" in determining prejudice to

the defendant. Thus, if standby counsel, perceiving some grave danger to the defendant's case, requests that the trial court retire the jury so that the matter can be explained to the defendant, standby counsel commits constitutional error. If the jury is removed and the legal matter is brought to the defendant's attention, it is quite conceivable that he later could claim that this diversion frustrated or flustered him, or that the mere act of counsel in requesting that the jury be removed was sufficient to prejudice him before the jury or that it had a "negative impact" upon his self-representation. Thus, how the trial court and standby counsel are to walk this fine line is very unclear indeed, given the lower court's rigid test for constitutional error and its presumption of prejudice. Petitioner urges this Court, instead, to adopt the "genuine opportunity" inquiry as the standard of review and test for prejudice.

In addition, the holding of the panel is inconsistent with other lower court decisions construing *Faretta*. In *Brown v. Wainwright*, 655 F.2d 607 (5th Cir. 1982)(*en banc*), the defendant first invoked his *Faretta* right; however, during the course of trial proceedings, his subsequent conduct and behavior were found to constitute a waiver of his right. The lower court's treatment of Respondent's requests for standby counsel's assistance from time to time and his acquiescence in counsel's assistance on occasions is inconsistent with the notion that a *pro se* defendant may, by his conduct, waive self-representation. While clearly Respondent in the instant case never waived his *Faretta* right entirely, the record reflects that from time to time he sought out counsel's affirmative participation and then acquiesced in his services, which constituted a waiver during those moments of claims of "interference" by standby counsel.

The record reflects that Respondent more often than not approved of counsel's limited assistance at trial. On various occasions, Respondent adopted counsel's objec-

tions. Other times, Respondent acquiesced in counsel's assistance. During some portions of the trial both Respondent and counsel argued, at Respondent's request. If any conflict in trial strategy arose between the two, the trial court, after ascertaining Respondent's wishes, always sustained Repsondent's position. Other times, when counsel indicated that he wished to make some point, the trial court specifically inquired whether counsel had Respondent's permission to do so. Finally, most instances when Respondent and counsel disagreed as to strategy occurred entirely out of the presence of the jury. Each time Respondent's position was sustained by the trial court.

The lower court, however, wholly discounts Respondent's requests for counsel to assist him and his frequent acquiescence in and approval of counsel's participation, in finding that counsel's assistance was harmful constitutional error. Further, the panel fails to point out that Respondent's strategic decisions were always sustained, and the majority of the conflict between the two occurred out of the presence of the jury. Moreover, the panel admittedly engages in speculation regarding harm to Respondent. Finally, the panel states:

> Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been *overtly encouraged* by the defendant.

681 F.2d at 275 (emphasis added). The opinion, however, ignores the fact that portions of counsel's assistance *were* overtly encouraged by Respondent. Respondent's conduct in requesting counsel's assistance and adopting his legal theories constitutes a waiver of objection as to that extent of counsel's participation.

Because the record reflects Respondent alone made the decision to proceed to trial, conducted the jury *voir dire*, selected the jurors, examined and cross-examined witnesses, made tactical and strategic decisions, chose and presented his defensive theories, made objections to evidence and argued in support of his position, made objections to the court's charge and submitted requested charges, and argued his case to the jury at both phases of the trial, the lower court's holding that the limited assistance of standby counsel constituted harmful constitutional error entitling Respondent to federal habeas relief, should not stand. This Court should grant certiorari to reject the Fifth Circuit's adoption of a presumption of prejudice where standby counsel in any way assists a *pro se* defendant, who had a genuine opportunity to conduct his own defense in accordance with *Faretta*.

CONCLUSION

For these reason, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

GILBERT J. PENA
Assistant Attorney General
Chief, Enforcement Division

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Petitioner

APPENDIX A

Carl Edwin WIGGINS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas Department of Corrections,
Respondent-Appellee.

No. 80-2278.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1982.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 26, 1982, 5 Cir., 1982, 681 F.2d 266)

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

Before CHARLES CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY, POLITZ, RANDALL,

TATE, JOHNSON, WILLIAMS, GARWOOD, JOLLY and HIGGINBOTHAM, Circuit Judges*.

E. GRADY JOLLY, Circuit Judge, with whom CLARK, Chief Judge, BROWN, GEE And GARWOOD, Circuit Judges, join, dissenting from denial of Suggestion for Rehearing En Banc:

The issue presented by this case is one of first impression and concerns the question of whether a criminal defendant's Sixth Amendment *pro se* rights under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), are violated when court-appointed standby counsel intermittently interrupts the defendant's presentation of his case.

Because I am convinced that the defendant did conduct his own defense and that the occasional interruptions by standby counsel were harmless, and because of the precedential effect of this case and its impact on the conduct of criminal trials in the future, I respectfully dissent from Judge Garza's thoughtful, well-written opinion.

In this opinion the court has stated that the test in assessing violation, *vel non*, of a defendant's right to self-representation is one of "harmless error." Elucidating the applicability of this test, the court has cited *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977), which stated in dictum that harmless error exists where the defendant is "afforded a genuine oppor-

*Judge Garza, author of the opinion, took senior status just prior to the rendition of the opinion and did not participate in the en banc vote.

tunity to help conduct his defense." *Wiggins v. Estelle*, 681 F.2d 266 at 274 n.26 (5th Cir. 1982).[1]

In making a determination of whether there has been harmless error, "an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their effect on the total mix." *Id.* at 274.

Viewing the record of this 4-day trial "as a whole," the inescapable conclusion is that not only did Wiggins have a "genuine opportunity to *help* conduct his defense," he did *in fact* conduct his defense. He conducted the voir dire without assistance or interference from counsel, made the opening statement to the jury, examined and cross-examined witnesses, objected to evidence and arguments, and argued his case to the jury at both stages of the bifurcated trial.

When conflict occasionally arose between the defendant and standby counsel, the trial court recognized the defendant's *pro se* rights and sustained his position.

---

1. In *Chapman*, the court cited *Juelich v. United States*, 342 F.2d 29 (5th Cir.), as an "appropriate use of the harmless error doctrine." 553 F.2d at 891 n.9. In *Juelich* this court held that denial of the statutory right to *pro se* defense under 28 U.S.C § 1654 was not *per se* grounds for reversal, absent a showing of prejudice:

> A careful reading of the record convinces us that appointed counsel was able, diligent and faithful, and that his participation in the trial certainly did not prejudice Juelich. Indeed, Juelich himself was freely permitted to assign additional grounds for his motion to vacate, to testify at legnth in his own behalf, to ask questions of the witnesses, and to argue his contentions. He thus had the benefit both of his counsel's services and of his own direct participation in the hearing. He was in no way prejudiced by the presence and participation of his counsel.

342 F.2d at 33.

When standby counsel sought to interject something, the trial court inquired specifically as to whether the defendant had given his permission.

On the whole, the defendant and counsel worked well together in full view of the jury. The defendant accepted numerous objections made by standby counsel and participated jointly with him in matters such as cross-examination and arguments to the jury.

In my view, the few incidents of interference which occurred were, examined in context, harmless under the *Chapman* standard. These incidents, which involved the use of profanity by standby counsel, were embarrassing to the trial court and are embarrassing to this court. This impropriety does not alter the fact that the defendant conducted his own trial within the framework laid down in *Farretta*. We should not allow our embarrassment to create bad precedent as a means of apologizing.

The importance of this case arises from the fact that the rule enunciated therein that standby counsel is "to be seen and not heard" creates numerous difficulties for trial court judges in their conduct of criminal trials. This rule defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket. I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error.[2]

The perfect trial has yet to be conducted. Its impossibility cannot, of course, deter our efforts for its

2. I note, for example, that in this case the defendant pleaded, alternatively, ineffective assistance of counsel. Following the dictates of this case, I would not be surprised to see such either/or appeals become routine practice.

achievement. Nevertheless, we must be aware of the realities with which trial judges grapple, day in and day out. It is my view that the panel lost that awareness, and that the en banc court should review this case before it becomes precedent in this circuit. I therefore dissent from the decision not to grant en banc.

APPENDIX B

Carl Edwin WIGGINS,
Petitioner-Appellant,

v.

W.J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 80-2278.

United States Court of Appeals,
Fifth Circuit.

Nov. 8, 1982.

Appeal from the United States District Court for the Western District of Texas.

Before GARZA, POLITZ and WILLIAMS, Circuit Judges.

GARZA, Circuit Judge:

Rarely does a case come before this Court with an issue never previously addressed. This is such a case. While other issues have been raised,[1] the pivotal

---

1. On this appeal, appellant has reurged all of the theories for federal habeas corpus relief presented below. Wiggins claims: (1) that he was denied due process because of pre-indictment delay; (2) that he was denied his right to a speedy trial; (3) that he was placed in double jeopardy when he was reprosecuted after his first conviction was set aside; (4) that he was denied his consitutional right to represent himself; (5) that he was denied effective assistance of

issue on this appeal is whether a defendant who is permitted to conduct his own defense may still be denied his constitutional right of self-representation[2] by unwanted interferance in his behalf by court-appointed, standby counsel. We conclude that such a violation can occur, as it did in the instant case, and reverse the district court's denial of the Great Writ.

The circumstances surrounding the crime are easy to relate. In the early evening of January 17, 1972, a man wielding a rusty pistol robbed a Piggly Wiggly store in San Antonio. After having the cashier stuff the day's proceeds into a brown paper bag, the robber fled the store and drove away in his car. Before driving away, however, a second store employee managed to see the thief's license plate number and wrote it down in the palm of his hand. That number was later traced to the appellant, Carl Wiggins.

(footnote continued from previous page)

counsel; (6) that he was denied the right to obtain defense witnesses; (7) that he was denied an adequate record for appeal; and (8) that he was denied the right to represent himself on appeal.

If meritorious, the first theories would demand that appellant forever be set free. The balance are less final. While the second three theories would require that Wiggins be given a new trial, the latter two would only permit him to re-appeal. A review of the record and applicable law reveals the first set to be spurious. The bulk of the remainder need not be discussed in light of our reversal of the district court's denial of habeas relief.

2. *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

After a few false starts,[3] Wiggins was indicted and subsequently brought to trial. Before trial commenced, however, appellant requested that he be permitted to conduct his own defense. The court granted that request, but at the same time appointed two attorneys as standby counsel.[4]

3. Wiggins was originally arrested on February 20, 1972, and an indictment was returned approximately two months later. On May 17, 1972, defendant successfully had that indictment quashed for being fatally defective. Accordingly, he was released. On June 7, 1972, Wiggins was reindicted for the same offense and taken into custody on June 29, 1972. He was tried in January 1973, found guilty, and, because of a charge of enhancement, was sentenced to life imprisonment. Approximately three weeks after sentencing, a hearing was held at defendant's request regarding two motions: a motion to withdraw notice of appeal and a motion for new trial. At that hearing, it was discovered that the second indictment was also fatally defective, and the court granted Wiggins' request for a new trial. Five days later, on March 28, 1973, two new indictments were returned by the grand jury, both alleging the same offense. On June 4, 1973, the State elected one of the indictments to try Wiggins under, and the trial in question commenced.

4. DEFENDANT: Your Honor, I am defending myself and feel that relative to the motions that I filed, that they can be heard without the transcript.

MR. SAMPLES: Your Honor, there has—an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.

THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for consultation [sic] and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.

(footnote continued on following page)

The conduct of these attorneys during the course of the trial is the core of appellant's argument that he was denied his Sixth Amendment right of self-representation. While the court made it clear that counsel were present for advisory purposes only,[4] it was not long before one of the attorneys began to take on a more active role. Soon Wiggins began to protest against standby counsel's unsolicted participation, claiming that it prohibited him from conducting his own

---

(footnote continued from previous page)

Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

....

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behing him.

You may proceed.

Record, vol. I, at 12-14.

4. *id.*

defense.[6] The court's response was that defendant was going to receive counsel's aid whether he wanted it or not.[7] When defendant later requested that the court at least instruct standby counsel not to take the initiative,

---

6. MR. GRAHAM: Again, Your Honor, we certainly believe that the arrest of the defendant's son, because of the , because of the—

DEFENDANT: Your Honor, the defendant's son was not arrested.

THE COURT: Wait a minute.

DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir, if you would ask this man to let me defend myself.

MR. GRAHAM: Certainly. Help yourself.

DEFENDANT: I would be grateful. I have not solicted his assistance, Your Honor, and I don't want it.

Id at 39.

7. THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

DEFENDANT: Yes sir, I am not a lawyer.

THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

DEFENDANT: Yes sir.

THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

DEFENDANT: Yes sir.

THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's case, well, then, I couldn't appreciate that.

Id at 40-41.

the court refused.[8] Thereafter, counsel continuously participated in the proceedings, both in and outside the presence of the jury. In addition to making objections too numerous to cite, counsel on several occasions curs-

---

8. THE COURT: All right. Mr. Wiggins, what is your pleasure. Mr. Graham here was appointed just two days ago as additional counsel. The law provides that when an attorney is appointed to represent someone, he shall have ten days time in which to prepare. You have had one attorney, though, that has been available to you and has had a month and a half to prepare, but you wish to proceed at this time?

DEFENDANT: Yes, Your Honor, I do.

THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

DEFENDANT: Yes, Your Honor.

THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?

DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistant, if I may.

THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

DEFENDANT: Yes sir, I would ask the Court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

THE COURT: Well—

DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

THE COURT: His availability, yes.

DEFENDANT: May I except to that, Your Honor?

THE COURT: It's in the record.

Id. at 65-67.

ed,[9] argued with defendant,[10] and moved for mistrial against the defendant's wishes.[11] By the time the smoke cleared, Wiggins had been convicted and sentenced to life imprisonment as a recidivist.

Little time was lost before Wiggins began running the gauntlet of direct appeal,[12] petitions for state writ of

---

9. One example of this occurred when Wiggins was examining a witness during voir dire:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?
MR. GRAHAM: God damn it. Wait a minute. I am trying to get...
(Thereupon, Mr. Graham conferring with defendant.)
Id. at 215. *See also* Record, vol. II, at 422.

10. The following is representative:

DEFENDANT: Your Honor, I have some questions relative to the in-Court—
MR. GRAHAM: We will take him on cross-examination.
DEFENDANT: I would like to ask him. They are very relevant.
MR. GRAHAM: You can get him on cross-examination. Sit down.
Record, vol. I, at 223.

11. MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicial as to require a mistrial.
DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel—
THE COURT: I denied the motion for mistrial. Overruled.
MR. GRAHAM: Jesus Christ.
Record, vol. II, at 422. *See also* Record, vol. II, at 345-46, 498-99, 512-14 and 539-40.

12. *Wiggins v. State*, 520 S.W.2d 780 (Tex.Cr.App.1975).

habeas corpus,[13] and a petition to the Supreme Court for writ of certiorari. When these routes proved unfruitful, Wiggins undauntedly applied for federal habeas corpus relief.[14] The district court disposed of the petition by adopting the recommendations of the federal magistrate to whom it had been referred. This appeal followed.

Fool for a Client?[15]

A

The leading case on the right to self-representation is *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). In that case, the accused clearly and unequivocally let it be known prior to trial that he wished to represent himself and did not want the aid of counsel. Yet despite a knowing and intelligent waiver, the state court compelled the accused to accept the services of a court-appointed public defender. The Supreme Court held, in a six to three decision, that under these circumstances, the defendant had been

13. Wiggins filed five petitions for state habeas corpus relief and hundreds of pages of various pleadings in the state courts. His first two applications were filed while his direct appeal was pending. The next two applications were denied by the Texas Court of Criminal Appeals on October 15, 1975, and may 3, 1978. On January 10, 1979, appellant's fifth application was denied; he was also found to have abused the writ.

14. Six separate points of error connected with his trial and conviction were alleged, together with two points of error connected with his appeal from that conviction. *see* note 1 *supra*.

15. "If there is any truth to the old proverb that '[o]ne who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a *constitutional* right on one to make a fool of himself." *Faretta v. California*, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 592 (1975)(Blackmun, J., dissenting).

denied his constitutional right to conduct his own offense.

In the case before us the defendant also chose, for whatever reason,[16] to proceed *pro se*. Unlike the *Faretta*

---

16. Numerous theories have been advanced for why a defendant might choose to represent himself.

> Defendant's refusal of the right to the assistance of counsel may be grounded on the defendant's belief that, with counsel, the defendant will be denied any opportunity to speak for himself or herself and that only through personal presentation of the case can the merits of the case really be made known. Further, a defendant may believe that no lawyer will faithfully represent the defendant at a fair fee, or that the judicial system is so inherently unjust that the only chance for a fair trial is for the defendant to represent himself or herself. Other motives may include the hope that the absence of counsel may afford a basis for reversal of a conviction regarded as inevitable, or the desire to ventilate hostility through the dramatic vehicle of a disorderly trial.

ABA Standards of Criminal Justice, The Trial Judge's Function, Standard 6-3.6(a)(2nd ed. 1980). *See generally Comment, The Right to Defend Pro Se in Criminal Proceedings*, 1973 Wash.U.L.Q. 679, 679-80 n.3 (1973); and Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 Duq.L.Rev. 245 (1964).

By far, the most frequently cited theory for why a defendant will elect to proceed *pro se* is that of trial strategy. He may view self-representation as a means of invoking the jury's sympathy by projecting the image of the lone defendant against the mammoth State. Participation by court-appointed counsel would sour that image in the minds of the jurors. A defendant may also want the opportunity to have the jury judge him as a person, and hopefully decide all matters of credibility in his favor. As part of that plan, he may choose to take a very low key approach to trial, thereby conveying the impression that he has nothing to hide. In this situation, counsel's intrusion may force disagreements and confusion which would undermine the picture the accused wishes to present.

(footnote continued on following page)

case, however, the right was granted. Nevertheless, court-appointed standby counsel were appointed over Wiggins' objections.[17] As already shown, one of these

---

(footnote continued from previous page)

> It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts. But where the defendant will not voluntarily accept representation by counsel, the potential advantage of a lawyer's training and experience can be realized, if at all, only imperfectly. To force a lawyer on a defendant can only lead him to believe that the law contrives against him. Moreover, it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Faretta v. California, 422 U.S. 806, 834, 95 S.Ct. 2525, 2540, 45 L.Ed.2d 562, 581 (1975).

17. *See* notes 4 an 8 *supra*.

That a trial court may appoint standby counsel even over the objections of an unwilling defendant is without question. This was expressly recognized in *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562, 581 n.46 (1975).

The presence of standby counsel allows a trial judge to retain an impartial role since the defendant may instead turn to his court-appointed attorney for assistance when troubled by legal matters. Should the *pro se* defendant lose his self-representation right—for example, by obstructionist misconduct—standby counsel can step in and the trial can continue uninterrupted, thereby conserving judicial resources. The same may be said for the situation where defendant chooses to abandon the right.

attorneys did far more than merely "standby." The narrow issue presented on this appeal, then, is whether a defendant's Sixth Amendment right to self-representation may be violated by the unsolicited participation of overzealous, court-appointed standby counsel.[18] it is an issue not presented in *Faretta*, but one clearly raised by it.

Since *Faretta*, the Supreme Court has shed little light on how many of the procedural difficulties resulting from that decision[19] should be resolved.[20] Nor has there been

18. This decision pertains only to those situations in which a defendant has elected to proceed *pro se*, but the court, in its discretion, has appointed standby counsel. What is not currently before us is the situation where, under State law, a defendant may elect to go to trial and conduct his own defense *together* with counsel. *See Faretta v. California*, 422 U.S. 806, 813 n.10, 95 S.Ct. 2525, 2530 n.10, 45 L.Ed.2d 562, 569 n.10 (1975).

19. In the conclusion to his dissent, Justice Blackmun ominously warned that

> Although the Court indicates that a pro se defendant necessarily waives any claim he might otherwise make of ineffective assistance of counsel, ante, at 835 n.46, 45 L.Ed.2d 581, the opinion leaves open a host of other procedural questions. Must every defendant be advised of his right to proceed pro se? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the pro se defendant differently than it would professional counsel? I assume that many of these questions will be anwered with finality in due course. Many of them, however, such as the standards of waiver and the treatment of the pro se

(footnote continued on following page)

a case, Supreme Court or otherwise, in which a court has been squarely presented with the question of defining the role of standby counsel.[12] However, notwithstanding the paucity of authority on the subject, *Faretta* itself offers some guidelines.

(footnote continued from previous page)

> defendant, will haunt the trial of every defendant who elects to exercise his right to self-representation. The procedural problems spawned by an absolute right to self-representation will far outweigh whatever tactical advantage the defendant may feel he has gained by electing to represent himself.

Faretta v. California, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 591-92 (1975).

20. In the seven years since its release, the Supreme Court has referred to *Faretta* only ten times, mostly in a cursory fashion. *Edwards v. Arizona*, 451 U.S. 477, 482, 489, 101 S.Ct. 1880, 1883, 1887, 68 L.Ed.2d 378, 384, 389 (1981); *Lenhard v. Wolff*, 444 U.S. 807, 808, 100 S.Ct. 29, 62 L.Ed.2d 20 (1979); *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 380, 417, 99 S.Ct. 2898, 2905, 61 L.Ed.2d 608, 621 (1979); *United States v. Grayson*, 438 U.S. 41, 56, 98 S.Ct. 2610, 2618, 57 L.Ed.2d 582, 593 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 382, 97 S.Ct. 2691, 2708, 53 L.Ed.2d 810, 834 (1977); *Brewer v. Williams*, 430 U.S. 387, 419, 97 S.Ct. 1232, 1249, 51 L.Ed.2d 424, 449 (1977); *North v. Russell*, 427 U.S. 328, 343, 96 S.Ct. 2709, 2716, 49 L.Ed.2d 534, 544 (1976); *Estelle v. Williams*, 425 U.S. 501, 522, 96 S.Ct. 1691, 1701, 48 L.Ed.2d 126, 141 (1976); *Michigan v. Mosley*, 423 U.S. 96, 109, 96 S.Ct. 321, 329, 46 L.Ed.2d 313, 324 (1975); and *Herring v. New York*, 422 U.S. 853, 864, 866, 95 S.Ct. 2550, 2557, 45 L.Ed.2d 593, 602 (1975).

21. A pre-*Faretta* case has stated in dicta, however, that "[a]lthough it is not error for the court to require counsel to be present and prepared to give advice, such counsel may not interfere with the defendant's presentation of the case and may give advice only upon request." *United States v. Price*, 474 F.2d 1223, 1227 (9th Cir. 1973). *See also United States v. Pomeroy*, 485 F.2d 272, 275 (9th Cir. 1973), *cert. denied*, 415 U.S. 981, 94 S.Ct. 1571, 39 L.Ed.2d 877 (1974).

(footnote continued on following page)

The essence of *Faretta* was succinctly stated:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the

---

(footnote continued from previous page)

A more active role for the attorney appears to be suggested by Standard 6-3.7 of the ABA Standards of Criminal Justice, The Trial Judge's Function (2nd ed. 1980):

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion. Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.

The Comments section to that standard, however, states that "the court should ordinarily appoint standby counsel to *assist the accused if and when called upon...*" (emphasis added).

See also Uniform Rules of Criminal Procedure 711, in which it was stated that

> Notwithstanding acceptance of a waiver the court may appoint standby counsel to assist when called upon by the defendant, to call the court's attention to matters favorable to the defendant upon which the court should rule upon its own motion, and, should it become necessary for a fair trial, to conduct the defense.

The Comments section further stated that:

> As long as the standby counsel only assists when called upon by the defendant and calls the court's attention to matters favorable to the defendant upon which the court should rule upon its own motion, as provided by the ABA Standard, there is not interference with the defendant's representing himself.

> right to make his defense... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant.... To trust counsel upon the accused, against his considered wish, thus violates the logis of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists .... An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta v. California, 422 U.S. 820-21, 95 S.Ct. 2533-34.

Court-appointed counsel was never meant to be an albatross tied around a defendant's neck. Instead, he was intended to be a means through which a defendant, ignorant of the intricate mechanics of the law, could effectively present his defense. *See Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932). But like any other tool, he may be used or not used. Here, Wiggins chose to conduct his own defense; this much was constitutionally guaranteed under *Faretta*. He also wished to dispose of the court-appointed standby counsel, but the trial court refused. Under *Faretta*, this matter was within the court's

discretion.[22] But while the presence of standby counsel may be forced on a defendant, his aid may not. His function is "to aid the accused *if and when the accused requests help....*" *Faretta v. California*, 422 U.S. at 835 n.46, 95 S.Ct. at 2541. Anything more would prevent the *pro se* defendant from conducting *his* defense. Therefore, the rule that we establish today is that court-appointed standby counsel is "to be seen and not heard." By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only,[23] to be used or not used as the defendant sees fit.[24]

B

The more difficult question on this appeal was posed by Justice Blackmun in his dissent to *Faretta:* "May a violation of the right to self-representation ever be harmless error?"[25] Perhaps the best authority for the

---

22. *Farretta v. California*, 422 U.S. 806, 835 n.46, 95 S.Ct. 2525, 2541 n.46, 45 L.Ed.2d 562, 581 n.46 (1975). *See also Mayberry v. Pennsylvania*, 400 U.S. 455, 466, 91 S.Ct. 499, 505, 27 L.Ed.2d 532, 540 (1971)(Burger, C.J., concurring).

23. His role, of course, will broaden should defendant lose his right to conduct his own defense, either through abandonment or forfeiture. *See* note 17 *supra*.

24. While not before us, we are conscious of the fact that in the interests of justice, the court of standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on itw own or after being asked by standby counsel, may *request* that the accused confer with counsel, but the defendant may elect not to do so.

25. *Faretta v. California*, 422 U.S. 806, 852, 95 S.Ct. 2525, 2549, 45 L.Ed.2d 562, 592 (1975). For other procedural questions left open by *Faretta*, see note 19 *supra*.

proposition that a denial of the right to conduct one's own defense will always be reversible error is *Faretta* itself. Nowhere in the case is there any indication that the defendant was prejudiced by the rejection of his *pro se* request, that his state-appointed attorney did not conduct an able defense, or that there were any statutory or constitutional grounds for reversal other than the trial court's denial of Faretta's right of self-representation. The case is clearly one in which an otherwise "harmless" denial of a constitutional right is itself sufficient grounds for reversal.[26]

Not every violation of a constitutional right, however, requires an automatic reversal of a conviction regardless of the facts and circumstances. As the Supreme Court stated in *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969): "although 'there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error;, not all 'trial errors which violate the Constitution automatically call for reversal.'" 395 U.S. at 251, 89 s.Ct. at 1727 (quoting *Chapman v. California*, 386 U.S. 18, 23, 87 S.Ct. 824, 827, 17 L.Ed.2d 705, 710 (1967)). *Faretta* is distinguishable. There the defendant's right to proceed *pro se* had been completely denied. Wiggins, on the other hand, had been granted that right. It had, however, been interfered with. Under these limited cir-

---

26. In *Chapman v. United States*, 553 F.2d 886, 891-92 (5th cir. 1977), this Court held that the denial of the right to self-representation can never be considered harmless in the sense that an error that has no effect on the outcome of the case is considered harmless. *See also Scott v. Wainwright*, 617 F.2d 99, 104 (5th Cir. 1980), *cert. denied*, 449 U.S. 885, 101 S.Ct. 240, 66 L.Ed.2d 111 (1980); and *United States v. Dougherty*, 473 F.2d 1113, 1127-30 (D.C.Cir. 1972). The *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 553 F.2d at 891 n.9.

cumstances, there is a need for a harmless error rule. Were there none, a reversal would be mandated every time overzealous counsel, acting in the best interests of his client, volunteered his aid without prior permission. This would be true even though the interjections were few and innocuous. Moreover, an automatic reversal rule would give unscrupulous counsel *carte blanche* to sandbag the prosecution. All that would be necessary to secure a new trial for a defendant whose conviction is a foregone conclusion would be for counsel to throw himself into the fray. Such results were not meant to be. Some flexibility is necessary, and the harmless error rule is the vehicle that takes us there.

Notwithstanding our adoption of such a rule for cases like the present one, the result below must still be reversed. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-11 (1967). The burden is a heavy one, and it rests on the government. In order to make such a determination, an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their affect on the total mix.[27]

---

27. While interjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned. Colloquies such as that set forth in note 10 *supra* would warrant further consideration. In addition, it is also important to note that trial strategy and the image defendant wishes to project to the jury are not the only reasons why a defendant may wish to proceed *pro se*. *See* note 16 supra.

A review of the record in the case at hand reveals that the government has failed its task of demonstrating that counsel's participation was harmless. As indicated earlier, counsel continuously objected, and on several occasions moved for mistrial, despite defendant's repeated requests that he play a more passive role. They were in constant disagreement over basic trial strategy, and at one point counsel cursed in front of the jury. We fail to perceive how such conduct could have anything but a negative impact on the jury. It also destroyed Wiggins' own perception that he was conducting *his* defense.

C.

One final point to address is the question of Wiggins' acquiescence. The government argues that more often than not, defendant approved standby counsel's participation or failed to register any protest when counsel acted in his behalf. Acquiescence, however, is not the only possible explanation for defendant's conduct. Early in the proceedings, the trial court let it be known that it was not going to order standby counsel not to participate.[28] More likely than not, Wiggins interpreted this statement to mean that continuous objections would be unproductive. Also to be considered is the fact that confrontation, in the presence of the jury, would only help to destroy the image defendant wished to convey to the jury.

All of the above, however, is speculation. Moreover, it is unnecessary in light of this opinion's definition of the role of standby counsel. Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been overt-

28. *see* note 8 *supra.*

ly encouraged by the defendant. Such action has not taken place here.[29]

REVERSED and REMANDED for the granting of the writ of habeas corpus and the entry of an appropriate judgment.

---

29. Wiggins authored a brief statement which he requested his court-appointed attorney on appeal to read to this Court. In light of the fact that this opinion focuses on a defendant's right to proceed *pro se*, it is appropriate that it be included here:

> The Supreme Court, and this Court before the Supreme Court, determined that the defendant has a constitutional right to defend himself without counsel if and when he elects to do so. This solidly established. And the trial court may, even over the defendant's objection, appoint a standby counsel for consultation or advisement. This much is held by *Faretta*. Or in the event that the defendant's conduct becomes disruptive, to be available to take over the defense if that becomes necessary. But when standby counsel abandons his designated assignment, and proceeds to participate in the trial against the def ndant's wishes, and over his objection, just how much participation by unwanted counsel is to be allowed? Where does there exist any markers to limit active participation of an aggressive lawyer that a defendant on trial wants no part of at all? If such active, unwanted, and unsolicited participation of standby counsel as this case presents is approved by the Court, would not this then open the doors for future cases that would provide for trial judges to make subjective and possibly inequitable determinations from case to case allowing or not allowing designated standby counsel to participate in varying degrees even over the objections of *pro se* defendants? If this becomes practice, where would the counsel participation line be drawn? If this becomes practice, it could be not said [sic] that such a defendant would have standing to complain of the effectiveness or ineffectiveness of counsel actively participating in trial against his [the defendant's] will. If this became practice, eventually the constitutional right we're talking about would surely become meaningless.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARL EDWIN WIGGINS,	§	
Petitioner	§	
	§	
V.	§	NO. SA-79-Ca-128
	§	
W.J. ESTELLE, JR., Director	§	
Texas Department of	§	
Corrections, and	§	
MARK WHITE,	§	
Attorney General of Texas,	§	
Respondents	§	

ORDER

On this date came on to be considered the petition for writ of habeas corpus filed herein by Carl Edwin Wiggins, and the Court having examined the pleadings of the petitioner, and having examined the report of the United States Magistrate and his recommendation, together with any objections, is of the opinion and finds that the magistrate's report is in all things correct and should be approved and adopted. It is accordingly

ORDERED that the petition for writ of habeas corpus be, and the same is hereby, DENIED.

SIGNED and ENTERED this the 26th day of August, 1980.

/s/ Fred Shannon

United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CARL EDWIN WIGGINGS, *Petitioner*	§	
V.	§	NO. SA-79-CA-123
W.J. ESTELLE, JR., Director Texas Department of Corrections, and MARK WHITE, Attorney General of Texas, *Respondents*	§	

FINDINGS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE

T O : Honorable Adrian A. Spears
United States District Judge

Petitioner, CARL EDWIN WIGGINS, has filed this application for writ of habeas corpus pursuant to 28 U.S.C. 2254, setting forth six separate points of alleged error in connection with his trial and conviction for robbery by assault in the 187th Judicial District Court of Bexar County, Texas, in Cause No. 73-CR-648. He further alleges two points of error in connection with his appeal from that conviction, which appeal resulted in conviction being affirmed. *Wiggins v. State*, 520 S.W.2d 780 (Tex. Crim. App. 1975). Petitioner's punishment was assessed at life imprisonment in the Texas Department of Corrections.

Before reaching the merits of petitioner's application for writ of habeas corpus, his motion to disregard respondent's answer must be determined. Petitioner originally filed his application for writ of habeas corpus in the Southern District of Texas, Houston Division, on

February 23, 1979. The petition was transferred to this Court on April 3, 1979. On June 1, 1979, the respondent filed his first motion for extension of time to answer, to which petitioner agreed, and an extension until July, 2, 1979, was ordered. Thereafter, on July 23, respondent filed his second motion for extension of time requesting an extension to July 26, which was granted. Petitioner in the meanwhile had filed his motion for judgment granting relief on July 25 and on July 30, filed a motion to vacate the order granting the extension of time. Finally, on July 26, an order was issued extending the time to answer until October 1, 1979. Petitioner has strenuously objected to all extensions other than the extension to July 2. He has further filed numerous motions requesting the Court to enter default against respondent and grant the relief requested in his petition. In support thereof he cites *U.S. ex rel. Mattox v. Scott*, 507 F.2d 919 (7th CSir. 1974). In that case the Court stated the proper remedy was not to grant release of a petitioner where the response was filed late, because to do so would put the burden of default on the community at large, but rather to refuse to consider the answer. *Id.* at 924. I believe that reasoning is sound. *Scott*, supra; See *Curtis v. Perini*, 301 F.Supp. 444, 445 (N.D. Ohio 1968), aff'd 413 F.2d 546 (6th Cir. 1969).

By way of a backdrop, petitioner was originally arrested on February 20, 1972, and an indictment (72-CR-777) was returned on April 19, 1972. On May 17, 1972, the indictment was discovered to be fatally defective and Wiggins was released. On June 7, 1972 he was reindicted (72-CR-1141) for the same offense and was arrested again on June 29, 1972. Wiggins was tried in January 1973, found guilty and punishment was set at life imprisonment. On March 23, 1973, it was discovered the second indictment was also fatally defective. The judgment and sentence were set aside and petitioner was granted a new trial. Five days later, on March 28, 1973, two new idictments (73-Cr-648 and 73-Cr-653) were

returned by the grand jury both alleging the same offense. On June 4, 1973, the State elected to try petitioner under 73-CR-648 and he was subsequently convicted.

Turning next to the merits of the petition, petitioner's first contention, that he was deprived of his right to present his own defense, is wholly without merit. Petitioner, on his own, made numerous pretrial motions, including motions for discovery (S/F 7) to set aside the indictment (S/F 8), special pleas (S/F 52), and preparation of jury list (S/F 60). He also exercised virtually exclusive management of the trial on the merits, leading direct examination of his own witnesses (S/F 348, 368, 381, 383, 384, 399, 403, 408) and cross examination of the State's witnesses (S/F 199, 269, 319, 332, 455, 532). Petitioner also stated he would like to consult with the attorneys for advice (S/F 40). Moreover, and notwithstanding petitioner's complaints, that appointed counsel, on his own initiative, repeatedly moved for a mistrial and otherwise interjected unwelcome objections, petitioner more often than not approved of counsel's actions (S/F 24, 26, 31-32, 82, 210-23, 235, 261, 284-86, 287-88, 301-304, 363, 421, 486, 517, 523-36, 541, 543). Indeed, any doubt that Wiggins was allowed to conduct his own defense was resolved when the Court refused appointed counsel an opportunity to question a witness because Wiggins objected to the questions being asked. (S/F 306-308) Lastly, the Court stated numerous times that Wiggins would be awarded singular control over the defense (S/F 4-5, 31-32, 3 08, 430). I find that the record as a whole establishes Wiggins was indeed allowed the right to conduct his own defense, and that the court-appointed attorneys were present in a standby, advisory capacity only. Appointment of counsel in that capacity was approved in *Faretta v. California*, 422 U.S. 806, 834 n.46, 95 S.Ct. 2525 (1974).

Any need to consider petitioner's second contention is obviated by my finding he was allowed to represent himself.

Wiggins next complains he was denied his sixth and fourteenth amendment right to compulsory process of two witnesses, Mr. Truman Beasley and Mr. Douglas Simmons. He states he filed subpoenas for Beasley and Simmons a month before trial but that the subpoenas were never processed.

Initially it is noted petitioner filed his application for subpoenas May 23, 1973, and trial on the merits began June 7, 1973. He made application for a subpoena to issue for Truman Beasley (Tr. 602-605), but failed to do so for Doug Simmons (S/F 272, 394). The Court instructed Wiggins to consult with his attorney to effect a subpoena on Simmons. There is nothing in the record to show petitioner ever did so. Nor did the petitioner ever show the materiality of Simmon's testimony other than "...he could be material, he could have seen the robbery, he could have given a description." (S/F 395). Wiggins also failed to insert into the record what Truman Beasley would have testified to. Finally, after calling Truman Beasley one last time, and there being no response, Wiggins, against the advice of counsel, rested (S/F 413-414). Petitioner, having made no attempt to show the relevance or materiality of the witnesses' testimony, or include what they would have testified to in the record, failed to comply with necessary State procedural requisites. *Brito v. State*, 459 S.W.2d 834 (Tex. Crim. App. 1970). That being the case, he cannot now urge denial of compulsory process without first showing both some cause for his default and prejudice resulting therefrom. *Buckelew v. United States*, 575 F.2d 515 (5th Cir.); *Hoskins v. Wainwright*, 440 F.2d 69, 71 (5th Cir. 1971); See, *Hardin v. Estelle*, 484 F.2d 944 (5th Cir. 1973). Petitioner has demonstrated neither cause nor prejudice.

Petitioner's next ground is that he was denied his right to a speedy trial. In support of this contention he states he was arrested on February 20, 1972, but not tried in Cause No. 73-CR-648 until June 4, 1973, i.e., a delay of approximately fifteen and one-half months. While it is true petitioner's *final* conviction (in Cause No. 73-CR-648) was not until June, 1973, the record reflects petitioner was initially indicted for this crime in Cause No. 72-777, dated April 19, 1972. That indictment was quashed on May 17, 1972. Wiggins was subsequently reindicted on the same charge, brought to trial, and convicted. The judgment of conviction and sentence were set aside due to an insufficiency in the indictment. Finally, on June 8, 1973, he was convicted and sentenced to life imprisonment. The leading decision on the right to a speedy trial is *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972). In that case the Supreme Court held that a defendant's constitutional right to a speedy trial could be determined only on an *ad hoc* basis, balancing the conduct of the prosecution as well as that of the defendant. It further pointed out that factors such as the length of and reason for the delay, the defendant's assertion of his right, and prejudice to the defendant should be considered. 407 U.S. at 530. *Torres v. Florida*, 477 F.2d 555 (5th Cir. 1973); *U.S. v. Zane*, 489 F.2d 269 (5th Cir. 1973). However, that test was held not to apply to cases dealing with pre-indictment delay absent a showing of actual prejudice. *United States v. Smith*, 487 F.2d 175, 177 (5th Cir. 1973). The indictment under which Wiggins was finally convicted (Cause No. 73-Cr-648) was returned on March 28, 1973, approximately five days after judgment was set aside under the previous indictment, and his trial under 73-CR-648 began on June 8, 1973 less than three months later. Of course a showing of actual prejudice by petitioner would nevertheless mandate granting relief. Actual prejudice has been defined as "...that prejudice resulting from a delay that has so impaired the defendant's capacity to prepare a defense as

to amount to an infringement on his right to a speedy trial." *United States v. Smith*, supra. Having fully examined the lengthy pleadings and record, I am of the opinion Wiggins has presented only the most tenuous claims of prejudice. That being the case, that is, no actual prejudice having been shown, this ground is without merit.

Petitioner next contends he was denied due process and equal protection of the law because of "multiple prosecutions not in accord with state law." In support of this contention Wiggins argues the trial court was without authority to set aside petitioner's conviction in Cause No. 73-1141, there were no legal provisions for a new trial under the circumstances, and his second trial (73-CR-643) constituted double jeopardy. First, the record shows the trial court set aside petitioner's conviction and sentence in Cause No. 72-1141 as a result of a meritorious motion by the defense to grant a new trial and dismiss Cause No. 72-1141. (Supp. Tr. No. 73-CR-648, in Cause No. 72-1141). The ground for the motion was that the indictment was fatally defective in that it failed to allege ownership. In view of the fact the indictment was fatally defective no jeopardy attached. *Ward v. State*, 520 S.W.2d 395, 397-98 (Tex.Crim.App. 1975). Therefore, a second trial of petitioner on the same charge under a subsequent valid indictment was proper. *Ward*, supra; See, *U.S. v. Jasso*, 442 F.2d 1054, 1056 (5th Cir. 1971), *cert. denied* 404 U.S. 845 (1971).

Wiggins penultimate allegation is that he was denied a full and adequate record for appeal. In support of this he alleges he specifically requested transcriptions of hearings in the 187th Judicial District Court dated December 7, 1972, and January 11, 1973, which hearings related to "adverse services" by his appointed attorneys in Cause No. 72-1141. Petitioner's conviction and sentence in Cause No. 72-1141 having been set aside on his own motion, any alleged "adverse services" by

defense counsel in that trial were thereby corrected. Therefore, failure to include in the record on appeal in Cause No. 73-CR-648 transcriptions of hearings relating to Cause No. 72-1141 was at most harmless error. See, *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). Moreover, petitioner is entitled only to a "record of sufficient completeness" to permit full and proper consideration of his claim *Draper v. Washington*, 373 U.S. 487, 499, 83 S.Ct. 774, 781 (1963). There is no allegation that peitioner did not have such a record in Cause No. 73-CR-648.

Finally, Wiggins claims he was denied the right to prosecute his appeal without state appointed lawyers. Initially it is noted that Wiggins, on November 20, 1973, requested counsel to be appointed to represent him on appeal (Tr. 800). Secondly, petitioner in spite of the fact counsel was appointed and filed an appellate brief, was allowed to file one himself. Petitioner's brief cited twenty-one grounds of error and is 150 pages long. Furthermore, if there was any question whether petitioner had his say on appeal it was resolved in the opinon of the Court of Criminal Appeals, when the Court stated, "(w)e have reviewed appellant's pro se brief and find that contentions urged therein are totally without merit or have been asserted in the brief filed by his court-appointed counsel on appeal." *Wiggins v. State*, 520 S.W.2d 780, 782 (Tex.Crim.App.1975).

RECOMMENDATIONS

(1) Respondents' answer and motion to dismiss should not be considered in reaching a determination on petitioner's application for writ of habeas corpus.

(2) Petitioner's application for writ of habeas corpus should be DENIED.

The Clerk shall serve a copy hereof upon all parties by mailing such copy by Certified Mail, Return Receipt Requested, to all attorneys of record and to Petitioner. Any party may serve and file written objections to such findings and recommendations within ten (10) days after being served.

SIGNED this 18th day of December, 1979.

/s/ Robert B. O'Connor

ROBERT B. O'CONNOR
United States Magistrate

(THIS PAGE INTENTIONALLY LEFT BLANK)

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office-Supreme Court, U.S.
FILED
MAY 5 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1135

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

W.J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

LESLIE A. BENITEZ
Assistant Attorney General
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711
(512) 475-3281

Counsel for Petitioner

CRAIG SMYSER
Vinson & Elkins
3100 First City Tower
Houston, Texas 77002
(713) 651-2730

Counsel for Respondent

Petition for Certiorari filed January 7, 1983
Certiorari Granted February 22, 1983

W. J. ESTELLE, JR., TEXAS DEPT. OF CORRECTIONS V. CARL EDWIN WIGGINS, NO. 82-1135

TABLE OF CONTENTS FOR JOINT APPENDIX

Relevant Docket Entries. A-1

Record Experts From Cause No. 73-CR-648, 187th Judicial District Court of Bexar County, Texas. A-3

Affidavit of Carl Edwin Wiggins Filed in Cause No. SA-79-CA-123, United States District Court for the Western District of Texas, San Antonio Division A-57

RELEVANT DOCKET ENTRIES

January 31, 1973: Respondent's convicted of aggravated robbery.

March 21, 1973: Respondent's motion for new trial granted.

April 17, 1973: Attorney Benjamen Samples appointed.

May 31, 1973: Attorney Norvell Graham appointed.

June 4, 1973: Respondent's re-trial began.

June 8, 1973: Respondent again convicted of aggravated robbery.

March 26, 1975: Affirmance of conviction by Texas Court of Criminal Appeals.

February 29, 1979: Application for federal habeas corpus filed.

August 26, 1980: District Court's denial of habeas corpus relief.

November 6, 1980: Certificate of Probable Cause to appeal granted.

April 30, 1981: Attorney Craig Smyser appointed to represent Respondent on appeal to Fifth Circuit.

May 12, 1981: Respondent filed application in United States Supreme Court for removal of appointed counsel.

October 5, 1981: United States Supreme Court denies application.

July 26, 1983: Judgment of Fifth Circuit reversing lower court's denial of habeas corpus relief.

November 8, 1982: Denial of rehearing and rehearing *en banc* in Fifth Circuit.

THE COURT: The State of Texas versus Carl Edwin Wiggins.

MR. RODRIGUEZ [prosecutor]: The State is ready, Your Honor.

MR. SAMPLES: Your Honor—

THE COURT: Mr. Wiggins. Come around here.
(Thereupon, doing so.

MR. SAMPLES: Your Honor, Mr. Wiggins, my client has indicated and requested that we announce ready on this case. It is my opinion—in fact I want the record to reflect that we have a motion for a transcript of the previous trial, and the Court granted this motion, and since the matter is being prepared, is not ready at this time, I do not feel that we can safely go to trial without it.

THE COURT: And you are moving that it be reset until—

DEFENDANT: No, sir.

MR. SAMPLES: I am, individually.

THE COURT: I understand. I understand, but you are requesting as attorney that this case be reset until after the transcript is made available?

MR. SAMPLES: Yes, Your Honor.

THE COURT: All right. Mr. Wiggins, do you understand?

DEFENDANT: Yes, Your Honor. I do understand and I disagree.

THE COURT: You disagree?

DEFENDANT: Yes, sir.

THE COURT: You understand that you will be waiving or giving up your right to the transcript even though the Court previously ordered and granted a motion for the trantscript?

DEFENDANT: No, Your Honor, I did not realize that I would be.

THE COURT: You can't have both. The transcript is not ready and the transcript cannot be available if we go to trial right now.

DEFENDANT: Well, Your Honor, could portions of that transcript be subpoenaed during the proceeding if it was necessary?

THE COURT: What portions of it that have already been transcribed can be made available, but other portions of it cannot be made available until after they are transcribed.

DEFENDANT: Well, Your Honor, I am ready for trial subject to hearings and motions that I filed. I am trying to get a hearing on some motions. Subject to that, subject to call of my witnesses; I am ready for trial and I am defending myself pro se, with the Court's permission, subject to the hearing of those motions, and I have been in jail for quite a long time.

(R 7-8)

. . .

THE COURT: ... I want to acquaint you with this. As I don't want to delude you into thinking that an alternative to the transcript is to have the reporter

here to read her notes. As I understand, you want her in the main trial of your case. The reporter here took the punishment phase in your case, if you are interested in that matter. That is available. The main trial on the case, the guilt or innocence aspect of it, was reported by Ms. Sulsar. She is no longer a county employee. She left to go get married, to go on her honeymoon.

DEFENDANT: Well, Your Honor, I will risk that and go to trial, if it please the Court.

THE COURT: It's not what pleases the Court. I want you to understand what your rights are. This Court wants to see that you have every right available to you, but we can't do the impossible.

DEFENDANT: I understand, Your Honor.

THE COURT: The decision has to be yours, but I want you to make an intelligent decision, in that this is not available to you.

MR. WIGGINS: If all the witnesses are here, Your Honor, I don't think it will be necessary for the transcript or any reading of the transcript and I filed the subpoena application I think in sufficient time and I would like to check on those.

And if they are here and available, subject to the Court's hearing the defendant's motions, well, I am ready for trial, Your Honor.

THE COURT: We will hear that as soon as we hear this other—

MR. SAMPLES: With respect to the transcript that we refer to, I think the Court may be under the impression that this is exclusively for the trial on the merits. Based on the motions that Mr. Wiggins has filed, I also feel like the transcript is necessary. I don't

feel that we can go forward with the motions, the various motions that ought to be heard by the Court without the transcript.

DEFENDANT: Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript.

MR. SAMPLES: Your Honor, there has—an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.

THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for counsultation and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.

Now, As I understant the law, he has a right to represent himself as long as he does that within the framework of the law and the rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

(R. 10-13)

. . .

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behind him.

You may proceed.

(R 13-14)

. . .

MR. GRAHAM: Well, if I may, Your Honor, the car was obviously stopped because of the license number, at the time that Mr. Cunningham testified that they were looking at the coat—they had all these conversation back and forth with the Corpus Christi Police Department. I think if there is anything in writing that reflects any of this, we are entitled to that that was done by the San Antonio—I mean by the Corpus Christi Police Department.

DEFENDANT: Your Honor, the only report—I would like to—I would like to—the defendant, myself, I would like to say that under the motion for discovery the only reports I would like to have from the Prosecutor or from the Corpus Christi officers is the request made—what request was made by the San Antonio officers to the Corpus Christi officers on January 17, where and when the said officers in Corpus Christi made confirmation of the defendant's car in Corpus Christi. That's the only information I ask for in discovery in regards to statements by these officers.

(R 37-38)

. . .

MR. GRAHAM: Again, Your Honor, we certainly believe that the arrest of the defendant's son, because of the, because of the—

DEFENDANT: -Your Honor, the defendant's son was not arrested.

THE COURT: Wait a minute.

DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir if you would ask this man to let me defend myself.

MR. GRAHAM: Certainly. Help yourself.

DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.

THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

DEFENDANT: Yes sir. I am not a lawyer.

THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

DEFENDANT: Yes sir.

THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

DEFENDANT: Yes sir.

THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that. He is alluding that my son was arrested. He was arrested only as to the effect that he was given a ticket and accompanied the police officers to the city hall and was then asked questions relative to where he had been and the defendant's car.

THE COURT: I understand this, Mr. Wiggins. This Court is not easily prejudiced. The attorney is not here testifying. I don't take these things for fact. And I am not ruling on guilt or innocence in this case, anyway. So you don't have to worry about whether or not he says he was arrested or not arrested.

(R 39-41)

. . .

MR. GRAHAM: May I approach the bench? There is a witness here. I would like to find out if he needs him on any of his motions.

DEFENDANT: Not on any of these motions, I don't believe. Let me see.

THE COURT: Defense witness?

MR. GRAHAM: Yes, Your Honor. It's a defense witness.

DEFENDANT: No, not on any of these motions.

MR. GRAHAM: Sgt. Taft Teller, on the motion for discovery.

THE COURT: He wants to see the photographs on something, as soon as that's done.

(R. 45)

. . .

DEFENDANT: The defendant would like to mark this as defendant's Exhibit F.

MR. GRAHAM: Your Honor, that belongs to the Court's file. Better to get a copy.

DEFENDANT: I would like to reserve that for later, if I may.

(R.50)

. . .

MR. GRAHAM: Your Honor, we have no objection to the officer refreshing his memory from his report.

THE COURT: I think we are going a little far afield of the motion.

MR. GRAHAM: I think on the basis of the discovery, I would like to see his report.

THE COURT: It's not covered by the discovery.

MR. GRAHAM: Police reports?

THE COURT: Not covered by the motion.

(R.51-52)

. . .

Q Well, the police station then?

A I took some pictures at the police station.

MR. GRAHAM: Your Honor, we would like for him to produce those photographs.

DEFENDANT: We would like to have them, yes, Your Honor.

THE COURT: Produce those Polaroid photographs?

MR. GRAHAM: Yes, Your Honor.

THE COURT: Were they shown to the witnesses?

WITNESS: No.

THE COURT: I don't see the relevancy.

MR. GRAHAM: I think the best evidence are the witnesses themselves when we get into the trial. I propose to show colored photographs to the witness and ask if they have ever seen them.

THE COURT: All right. You can produce them?

WITNESS: I don't know. I looked through the file. The file was open to 15 or 20 detectives. I don't know whether they are still there or not.

(R.54-55)

. . .

DEFENDANT: Your Honor, I have just learned today that one of my witnesses, Mr. Truman Beasley, 5002 Gollihar, Corpus Christi, to Bryan, Texas. He is the advertising director for the newspapaer in Bryan

and I would ask that a subpoena be directed to Bryan Newspaper in Bryan, Texas for Mr. Truman Beasley. Could this be done right away, Your Honor?

THE COURT: Lee Beasley?

DEFENDANT: No sir, Mr. Truman Beasley, formerly of 5002 Gollihar.

THE COURT: All right. Get me an application. Take it up with counsel assisting you right there.

(R.60-61)

. . .

THE COURT: The reason I am not starting this afternoon, Mr. Graham, who has just been appointed within a sufficient length of time, but Mr. Graham has been appointed as additional counsel here last Thursday and has a doctor's appointment at four o'clock. I don't think we would accomplish very much between now and four o'clock. So because of the shortness of notice to him, I don't want to impose on him anymore than necessary.

(R.63)

. . .

What says the State—ready?

MR. RODRIGUEZ: Yes sir; we are ready.

THE COURT: All right. What says the defense?

MR. GRAHAM: Your Honor, I would like to advise the Court at this time that my appointment was last Thursday. I don't feel like I can waive the ten days preparation. Howver, my client feels like he can waive the ten days and agreed to sign a waiver.

THE COURT: All right. Mr. Samples, when were you appointed? Was it more than ten days?

MR. SAMPLES: Yes sir. Approximately a month and a half.

THE COURT: You have been appointed and you have been available in this case a month and a half?

MR. SAMPLES: Yes sir.

THE COURT: All right. Mr. Wiggins, what is your pleasure. Mr. Graham here was appointed just two days ago as additional counsel. The law provides that when an attorney is appointed to represent someone, he shall have ten days time in which to prepare. You have had one attorney, though, that has been available to you and has had a month and a half to prepare, but you wish to proceed at this time?

DEFENDANT: Yes, Your Honor, I do. Before I announce ready, though, I would like to inquire about the makeup of these jurors right here. If I may look to—

THE COURT: First, I don't want to get off the subject.

DEFENDANT: We will waive the ten days on Mr. Graham.

THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

DEFENDANT: Yes, Your Honor.

THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?

DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.

THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

DEFENDANT: Yes sir, but I would ask the court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

THE COURT: Well—

DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

THE COURT: His availability, yes.

DEFENDANT: May I except to that, Your Honor?

THE COURT: Its in the record.

(R.64-67)

. . .

THE COURT: You have an exception to any ruling of the Court without taking it, Mr. Wiggins. That's the law.

DEFENDANT: Yes sir.

MR. GRAHAM: Your Honor, at this time I request that the defendant sign this waiver filed among the records in the case.

(Thereupon, defendant doing so.

(R.69)

. . .

THE COURT: Ladies and gentlemen, because this is a bifurcated trial, that is, two-phased, where the jury, if they return a verdict of guilty, would then—would have the second phase in which event the jury would fix the punishment to be received.

I would instruct you that the punishment prescribed by the legislature for the offense of robbery is not less than five years in the penitentiary nor more than life in the penitentiary, or any number of years in between.

Now, the defendant in this case is charged by indictment as a repeater—

MR. GRAHAM: Your Honor, we will object to that.

MR. RODRIGUEZ: May I approach the bench?

DEFENDANT: May I approach the bench?

THE COURT: You may approach the bench.

(R.81)

. . .

DEFENDANT: I object on the grounds that the Prosecutor is trying to provoke the defendant to ask for a mistrial.

MR. GRAHAM: Comes now the defendant, Carl Edwin Wiggins, and respectfully moves that this entire panel be quashed on the grounds that the Court's action advising them that he was a repeater is highly prejudicial and is tantamount to his grounds to have the panel quashed.

DEFENDANT: Defendant does object and except to the same.

(Thereupon, defendant confers
(with appointed counsel.

THE COURT: All Right. Ladies and gentlement of the jury, being a civil judge, I just went a step too far. I am going to ask you to return to the central jury room. We are going to have to get another panel. Please do not—I am instructing you: do not converse with any other jurors in connection with this matter. We will have to bring up another panel. I was not supposed to have told you that he was a repeater. Do not speak to any other jurors about it.

(R.82)

. . .

This Court is a Constitutional Court and has a limited trial jurisdiction. However, the enabling statute which created this Court admonished that it would give priority to criminal cases. So the case we have for trial here this morning is the State of Texas vs. Carl Edwin Wiggins. It is an alleged robbery by assault case. The indictment alleges robbery by assault.

Mr. Wiggins, would you stand and face the panel?
(Thereupon, doing so.

THE COURT: All right. You may be seated.

Now, there is one reasonably rare aspect to this case. Mr. Wiggins, which has a right to do, has elected to be his own lawyer in this case, to try his own case. The Court, however, has appointed two practicing members of the Bar of San Antonio to represent and assist Mr. Wiggins where he desires to use their help or where the Court directs that he confer with the attorneys and they are Mr. R. Norvell Graham and Mr. Benjamin Samples.

(R.84)

. . .

DEFENDANT: The defendant pleads not guilty to the accusation and, Your Honor, I have an opening statement. Is it appropriate to make it now or later? I would like to make an opening statement before any witnesses.

THE COURT: I don't think there is any provision for any opening statement by anybody.

DEFENDANT: I am sorry, Your Honor. That was the—

THE COURT: That's in a civil case, an opening statement.

MR. GRAHAM: Just a moment.

DEFENDANT: Well, Your Honor—
(Thereupon, conference is held
(among the defendant and
(defense counsel.

(R.191)

. . .

A I was told by Mr. Davila, who is the assistant manager, that he followed—

MR. GRAHAM: Objection—to anything he was told, Your Honor. It would be hearsay, outside the presence of the defendant.

THE COURT: Be sustained.

Q In connection with any other data, any other information given you regarding the robber, were you give any sort of description of a car?

A Yes sir, I was.

MR. GRAHAM: Leading his witness.

THE COURT: Don't lead, Counsel.

MR. RODRIGUEZ Yes sir.

(R.196)

. . .

Q In his 60's. Okay. And that's all you have as far as the description?

A No, no sir. White male, 60's, brown checkered sports coat, brown slacks, brown canvas-type hat—

MR. GRAHAM: That's enough, Your Honor.

THE COURT: Pardon?

DEFENDANT: Your Honor, I want to ask the Court if I could—if Mr.—Detective Anderson could be subpoenaed. He may have some notes relative to the description given at the scene.

THE COURT: Your attorney can advise you to have any witnesses available.

DEFENDANT: Thank you, Your Honor.

(R.204-05)

. . .

MR. GRAHAM: Your Honor, at this point I would like to take this witness on voir dire and go into the background of his identification.

THE COURT: All right.

MR. GRAHAM: I am going to do this.

VOIR DIRE EXAMINATION

Questions by Mr. Graham:

Q Mr. Baumann, I believe—by the way, this that I am holding in my hand is a statement you gave to Detective Taft Teller—

THE COURT: Just a minute, Counsel. I want to get something straight. Are you examining with the permission of Mr. Wiggins. Mr. Wiggins announced earlier in the case he didn't want you participating in or asking any questions or anything else. I just want the record to reflect that it is with his permission.

MR. GRAHAM: I think on this particular point, on this particular issue—

DEFENDANT: I won't object to it, Your Honor, at this hearing.

THE COURT: All right.

MR. GRAHAM: This is, of course, a legal proposition.

THE COURT: Previously he had informed me to order you not to do or say anything.

MR. GRAHAM: Yes sir.

THE COURT: Which I declined to do.

(SF 209-211)

. . .

DEFENDANT: I want to ask him this question here on this statement that's dated February 15.
May I show it to you?

MR. GRAHAM: God damn it. Wait a minute. I am trying to get ...

(Thereupon, Mr. Graham
(conferring with defendant.

(R.245)

. . .

DEFENDANT: The second statement he showed you—

MR. GRAHAM: Just a minute. I am going to examine.

DEFENDANT: I am sorry, Your Honor.

(R.248)

. . .

DEFENDANT: Your Honor, I have some questions relative to the in-Court—

MR. GRAHAM: We will take him on cross-examination.

DEFENDANT: I would like to ask him. They are very relevant.

MR.GRAHAM: You can get him on cross-examination.
Sit down.

THE COURT: You say you wish to ask further questions on voir dire at this time?

DEFENDANT: Yes sir, Your Honor.

THE COURT: Go ahead.

(R.112-24)

. . .

MR. GRAHAM: Ask him one question. Don't sit down and argue.

DEFENDANT: I am sorry.

(R.232)

. . .

MR. GRAHAM: Let me make a motion, Your Honor. We move to suppress the in-Court identification on the grounds it is tainted by the photographs that were shown to the witness.

THE COURT: I dont't think the State has had an opportunity yet to develop what the evidence is. We have just had him on voir dire. That's all.

MR. GRAHAM: Yes sir.

(R.235-36)

. . .

DEFENDANT: Your Honor, I would like to ask a question, if I may.

THE COURT: I am not going to permit any more questions.

MR. GRAHAM: We move for the Court to suppress, then.

THE COURT: I am going to reserve my decision on that.

Let's bring the jury back.

(R.242-43)

. . .

DEFENDANT: I would like to subpoena him, Your Honor.

THE COURT: All right. Take it up with your attorneys. That's the reason you have assistance of counsel.

(R.248)

. . .

THE COURT: Mr. Wiggins, one of your court-appointed counsel, Mr. Samples, is in attendance on another court. Do you wish to wait until he is available or do you wish to proceed with the assistance of Mr. Graham here?

DEFENDANT: I believe, Your Honor, I would like to wait for Mr. Samples, if I may, because I do wish to consult with him.

(R.255)

. . .

Q What did you think he was going to do if you had refused him?

MR. GRAHAM: Okay, Your Honor, that certainly calls for a conclusion.

THE COURT: Sustained.

MR. GRAHAM: I would like to ask the Court to instruct the jury to disregard.

THE COURT: The jury will be instructed to disregard the last question.

MR. GRAHAM: Not withstanding the Court's instruction, I feel that the question is of such prejudicial nature as to require a mistrial and respectfully move for a mistrial.

THE COURT: That will be denied.

(R.261-62)

. . .

DEFENDANT: Your Honor, the defense would like to subpoena Mr. Doug Simmons.

THE COURT: Don't tell me about it. Tell your Court-appointed lawyer about it.

DEFENDANT: Okay.

(R.272)

. . .

Q I am not asking you that, Mr. Baumann, I am asking you this: did you appear before a Grand Jury, before those twelve people, a Grand Jury, and you identify some photographs so this Grand Jury—

MR. GRAHAM: Just a moment.

Q —when the defendant wasn't present?

MR. GRAHAM: I would like for the Court to strike his response to the question about the Grand Jury from the record on the grounds it is unresponsive.

THE COURT: Counsel, I think it's repetitious anyway. The witness said that he had no recollection of appearing before the Bexar County Grand Jury.

MR. GRAHAM: Well, Your Honor, perhaps I can make it clear outside the presence of the jury.

THE COURT: All right. Ladies and gentlemen, under the instructions previously given you, will you retire to the hall. Don't go too far. I will call you back in.

(R.286-87)

. . .

MR. GRAHAM: Comes now the defendant, in the absence of the jury, and requests that the Court instruct the witness in responding to any reference to the photographs not to allude to, mention or suggest that the pictures contained matters that would show that they were pictures of convicts from the Texas Department of Corrections.

MR. RODRIGUEZ: May I address the Court on that, if he is through? I don't know whether he is through.

THE COURT: Go ahead.

MR. RODRIGUEZ: My argument to the whole proposition right now is the defendant cannot be allowed to ask questions then, if they don't like the response, either he and his attorneys object to the response that has been elicited. Twice he has gone into this matter, he can't ask a question then if he doesn't like the answer, then his attorney gets up and objects. I object to both of them conducting this trial. It's either one man or the other. According to the Court of Criminal Procedure only one man who can object, lead, or cross-examine on whatever the matter is.

THE COURT: Counsel, I understand, but this case has peculiarities and is unique.

MR. RODRIGUEZ: I appreciate that.

THE COURT: It is not completely unique. I have been through some of this before, but I have an individual here who first doesn't want his counsel and then when counsel is not here he holds up the Court for fifteen or twenty minutes because one or two of his lawyers were not present in Court at the time, obviously trying to irritate the Court and everyone else concerned; but the Court is going along with him and give him every right that he is entitled to. I will instruct the witness to respond to the question as best you are able to understand it. I will admit that some of these questions I can't even follow.

(R.288-89)

. . .

DEFENDANT: Your Honor, may I approach the bench. I would like to apologize if the defendant has indicated that he desired to irritate the Court in any way.

THE COURT: Well, I am just going to grant you every right that you are entitled to and probably some even that you are not entitled to.

DEFENDANT: Thank you, Your Honor.

THE COURT: The record will speak for what you are getting.
(R.289-90)

. . .

THE COURT: I think you better confer with your counsel about this here and that there and things I have in my hand, means nothing in the record and I think if

you will consult with your attorneys they will tell you the proper way of approaching that.

DEFENDANT: Thank you, Your Honor.

MR. GRAHAM: I would like to have the statement of Melvin Baumann given to Detective Taft Teller on the 15th day of February, 1972, at 1300 hours, marked for identification.

THE COURT: It's not already marked?

MR. GRAHAM: No sir.

(Thereupon, Defendant's Exhibit H marked for identification.

MR. GRAHAM: And for the purposes of the record what has been previously marked as State's Exhibit No. 2 is the statement by Melvin Baumann given to Detective Taft Teller on March 6, 1972 and for the further purposes of the record what has been marked as Defendant's Exhibit F is the statement purporting to be given to Maury Maverick on October 7, 1972 by Melvin Baumann. I will hand these exhibits to the defendant and ask him if those are his statements and that is his signature on all these statements?

MR. RODRIGUEZ: Let's not get confused. Mr. Graham is assisting the defendant. A witness is on the stand; not the defendant.

MR. GRAHAM: All right. The witness. Pardon me, Mr. Rodriguez.

(R.192-94)

. . .

MR. GRAHAM: Your Honor, the inference there made by the District Attorney, I ask that the Court instruct the jury to disregard that.

MR. RODRIGUEZ: He opened it up.

THE COURT: I will overrule the objection.

MR. GRAHAM: Note my exception.

(R.301)

. . .

MR. GRAHAM: I object to that. That's highly improper and immaterial at this point.

THE COURT: Overrule the objection.

MR. GRAHAM: Note my exception.

(R.302)

. . .

Q Do you remember this man because of his pictures or because he is the one who robbed you?
A He is the one that robbed me.

MR. GRAHAM: Repetitious. Object.

Q Because he is the one that robbed you?
A Yes, sir.

MR. GRAHAM: Your Honor—

THE COURT: Go ahead.

MR. GRAHAM: All right.

Q Now, insofar as this line of questions that he has been going on about the age and all this, now, this tan that you spoke of, was leathery type?

A Leathery.

MR. GRAHAM: Object to the suntan. Objection. This is suggestive, leading.

THE COURT: All right. Don't lead, counsel. Sustain that objection.

MR. GRAHAM: I will ask that the Court instruct the jury to disregard the question.

THE COURT: All right. I will instruct the jury to disregard the last question.

(R.304)

. . .

Q Now, about this business of being afraid, you were afraid of what? We left off on that.

A I was afraid anything could happen. He could have shot me if I didn't cooperate with him.

DEFENDANT: This is unbelievable.

MR. RODRIGUEZ: I believe those are all the questions I have, Mr. Baumann. Thank you.

(Thereupon, Mr. Graham
(talking to defendant.

THE COURT: Do you have any additional questions of this witness?

MR. GRAHAM: Your Honor, there is one question that I feel as his attorney should be asked.

THE COURT: Now, counsel, we have ground rules here. The question is whether or not the defendant want to ask the question.

DEFENDANT: Well, Your Honor, I do have—trying to think of a question or two, but ... I would like to ask him again if ... if it's ...

THE COURT: Don't ask him anything that you have asked him before. In other words, don't try to to trod on the same ground over and over. The jury heard it. It's fresh in their minds.

MR. GRAHAM: Your Honor—
DEFENDANT: I believe I will pass the witness.

MR. RODRIGUEZ: May he be excused?

MR. GRAHAM: Just a moment. Can we confer? Counsel feels the defendant should require that the question be asked.

THE COURT: Ladies and gentlemen, I have been abusive of you this morning because of various matters that we have had to take up in your absence. I haven't really given you a recess except haphazard ones. On instructions previously given you, I am going to give you a fifteen-minute recess at this time. Remember my instructions. You may go anyplace you like, no farther than seven and a half minutes away.

(Thereupon, jury withdrawn
(from the courtroom.

MR. GRAHAM: Your Honor, I have conferred with my co-counsel and we feel that this is a question that should be asked or required to be asked.

THE COURT: Gentlemen, let me say this to all concerned. I can appreciate how counsel feels about this but this defendant has been granted by this Court the right to represent himself, which he has a right in law. I have even overrriden his desire by requiring that appointed counsel be available to assist. Now, I don't

think that this Court can extend itself to supersede his judgment. If you have had an opportunity to make him acquainted with what you feel he should ask, if it is not his desire to have that question asked, then I don't think that under the circumstances and the ground rules under which we are operating, that it would be fair to this defendant to have that question asked in spite of his objection.

MR. GRAHAM: All right. Then may I say this, may I propound the question to the witness outside the presence of the jury purely for the purpose of preserving the record for him.

THE COURT: I don't see how we are going to preserve the record on appeal. This is not something that we take on voir dire to see what his answer might be.

MR. RODRIGUEZ: Then if they don't like it—

THE COURT: We are not going to have exploratory things on this. You may have a recess, and you can consult with the defendant and, if at the end of the recess you want to ask the question, fine. If he doesn't want to ask the question, fine. I am not going to—at least when it is a judgment call—I am not going to insist that our judgment, your judgment or Mr. Sample's judgment would control. His judgment would control, but I want him acquainted with what his legal rights are. It's peculiar to work under these conditions, but this is what we are going to have to do.

DEFENDANT: May I say it is peculiar to me, Your Honor and I would really appreciate it if I could—if I could conduct my defense without the assistance and interruptions of counsel, with all respect, Mr. Graham.

THE COURT: All right.

MR. GRAHAM: I will sit third chair from now on. I will move back one notch.

THE COURT: I am not going to order you Mr. Graham, because I know you are competent counsel, but let me suggest to you that unless he consults with you—you do your thing anyway, but don't object or don't ask questions unless and until the Court request that you consult with him because he doesn't know the proper way to do something.

DEFENDANT: Thank you, Your Honor.

(R.305-09)

. . .

A Yes, sir.

DEFENDANT: Thank you.

MR. RODRIGUEZ: Nothing further, Your Honor.

MR. GRAHAM: Your Honor, may I confer just a moment?

THE COURT: All right. You may confer.
(Thereupon, Mr. Graham
(confers with defendant.

DEFENDANT: That's all, Your Honor.

(R.326)

. . .

THE COURT: All right. For the record, Mr. Wiggins, is it all right to proceed even though Mr. Samples is not here at the present moment?

DEFENDANT: Yes, Your Honor.

THE COURT: Let the record show, however, that Mr. Norvell Graham is here.

(Thereupon, jury brought into (the courtroom.

(R.328)

. . .

MR. RODRIGUEZ: At this time, Your Honor, we do offer State's Exhibit No. 3 into evidence.

MR. GRAHAM: Counsel for the defendant would object to its introduction on the grounds that same purports to be a business record; however, the same was not kept by an employee or agent of the Texas Highway Department but rather was kept—this record was compiled by the clerk, County Tax Assessor, Nueces County, and therefore it's not admissible under the business records act.

THE COURT: Let me see it.

(Shown to Court.

(R.339)

. . .

MR. RODRIGUEZ: At this time we re-urge or offer into evidence State's Exhibit No. 3.

MR. GRAHAM: May I take hime on voir dire?

THE COURT: You may.

DEFENDANT: Your Honor, may I approach the bench?

THE COURT: Yes.

(Thereon, conference held out
(side the hearing of the court
(reporter among the defendant
(and all counsel and the Court.

THE COURT: The defendant has withdrawn his objection to State's Exhibit No. 3 and it will be admitted into evidence.

(R.340)

. . .

MR. RODRIGUEZ: At this time the State is going to rest its case.

MR. GRAHAM: May I be excused for just a minute?

MR. RODRIGUEZ: Just a second, Mr. Graham. At this time the State is going to rest its case.

MR. GRAHAM: Judge, we'd like to recall a witness for recross-examination.

THE COURT: All right.
Mr. Wiggins and Mr. Graham.

(Thereupon, conference held
(outside the hearing of the
(court reporter among defen-
(dant, the Court and all
(counsel.

THE COURT: Ladies and gentlemen of the jury, I will run you out of here for about five minutes. Remember my instructions. You may retire at this time.

(Jury withdraw from court-
(room.

THE COURT: Again, for the record, this is a judgment call. I will let you fully advise the defendant of the desirability, if you feel there is a desirability to take a different tack as far as this witness or anything else is concerned, but the Court still feels that once he is properly advised as the advisability of doing something, and the legality involved, then it's a judgment call on his part. So I will give you full opportunity, you and Mr. Samples, full opportunity to confer with Mr. Wiggins.

(Thereupon, counsel confer
(with defendant.

MR. GRAHAM: Comes now the defendant Carl Wiggins, and after the close of the State's case, moves that the Court grant him an instructed verdict of not guilty on the grounds that the State has not proved its case or, in the alternative, has not proved its case by the preponderance of the evidence; that the evidence—

THE COURT: You mean beyond a reasonable doubt?

MR. GRAHAM: —beyond a reasonable doublt. I'm sorry. Excuse me, Judge, beyond a reasonable doubt. And in the alternative, that the evidence is insufficient to convict, and respectfully moves the Court to grant him an instructed verdict.

DEFENDANT: Your Honor, may I make a motion?

THE COURT: All right.

DEFENDANT: To that extent, after the jury returns and—

THE COURT: After the jury returns? Your motion will be made in their absence.

DEFENDANT: I do have a motion to make.

THE COURT: Make your motion.

(R.341-42)

. . .

THE COURT: All right. The first motion for instructed verdict will be denied. The second motion for acquittal made by the defendant pro se is denied.

MR. GRAHAM: Your Honor, at this point I would like to dictate into the record some of the recent things.

THE COURT: All right. Go ahead.

MR. GRAHAM: Comes now attorneys for defendant Carl Wiggins, R. Norvell Graham, Jr., and Benjamine Samples, and respectfully advise the Court that during the interrogation of the witness Dennis and the interrogation of the witness from the Highway Department—Mr. Pool—we advised the defendant that he had a right to read and examine a copy of the offense report made by Officer Dennis, which contents may or not have exculpatory or helpful matter in it for the purpose of his defense; and further advised him that the witness Pool had brought other records from the Highway Department which Pool refused to allow attorney for the defendant to inspect; that he was advised by his attorneys, both of them, that he had a right to inspect those and the Court would so order the witness to provide those copies for his inspection, but that he failed to heed the advice of his attorneys and refused to allow his at torneys and at other times when you request it or at additional times when the Court orders it or suggests that there be a conference between you all.

DEFENDANT: Well, Your Honor, at times when the defendant is listening to the testimony and or ques-

tioning, cross-examining or examining a witness, now, will you ask counsels to wait until the testimony is over or hold up the proceedings for a moment, because the defendant can't listen to their voice and at the same time listen to the testimony.

THE COURT: All right. You can hold up your hand and I will stop the proceedings.

DEFENDANT: Thank you, Your Honor.

THE COURT: All right.

(R.344-46)

. . .

DEFENDANT: I object, Your Honor.

THE COURT: What's your objection?

DEFENDANT: Hearsay.

THE COURT: Be sustained.

MR. RODRIGUEZ: It's a good objection.

(R.352)

. . .

DEFENDANT: Object to that, Your Honor. That's hearsay.

THE COURT: Sustained. You are instructed to disregard the last answer.

(R.352)

. . .

DEFENDANT: The defense rests, Your Honor.

MR. GRAHAM: Just one moment, Your Honor.

DEFENDANT: The defense rests, Your Honor.

MR. GRAHAM: I would like ... well ...

THE COURT: The defense rests?

MR. SAMPLE: May we confer?

THE COURT: You may confer.

(Thereupon, Mr. Sample and
(the defendant confer.

THE COURT: Ladies and Gentlemen of the jury, if you will just go into the hall for five minutes. Remember my instructions.

(Thereupon, jury withdrawn
(from the courtroom.

MR. GRAHAM: May I have just a moment with Mr. Wiggins?

(Thereupon, Mr. Graham and
(Mr. Sample confer with
(Mr. Wiggins.

MR. GRAHAM: Comes now R. Norvell Graham, Jr., and Benjamin Sample, appointed attorneys for the defendant Carl Wiggins, and would show unto the Court that they have advised Mr. Wiggins that the last witness, Lee Beasley, would give testimony that would raise the issue of alibi in the Court's charge. He would further testify as to the discrepancies concerning the color of the car that was used in the alleged robbery, that he would further testify that he had a conversation with the defendant in Corpus Christi, Texas, at approximately six o'clock on January the 18th or 19th, which date he is not absolutely sure, that in my opinion this

witness' testimony should be elicited to raise this defense issue of alibi and in the absence of that, that issue would leave him without a defense.

THE COURT: All right. The defendant has elected, though, to rest and not ask those questions?

MR. GRAHAM: Yes, Your Honor.

THE COURT: All right. Let the record reflect that.
The defense rests.

Now, as far as the witness that's here from Ancira-Winton, you don't want to use him?

DEFENDANT: No, Your Honor.

THE COURT: Sorry to bother you.

MR. GRAHAM: Just a moment. In connection with the witness from Ancira-Winton, the defense would show with certainty the colors of a 1970 Chevrolet, white over beige and would show the difference in color of a white over beige or beige over white as opposed to a blue over white automobile, and the official color chart of General Motors would show the difference in color.

THE COURT: Again the defendant himself has elected, on judgment call, not to use those?

MR. GRAHAM: Yes, sir.

(Thereupon, witness excused
(leaves courtroom.

THE COURT: You may bring the jury.

(Thereupon, jury brought into
(the courtroom.

MR. RODRIGUEZ: The State calls in rebuttal Officer Russell Crawford.

MR. GRAHAM: May I approach the bench, Your Honor?

(Thereupon, all counsel,
(including the defendant, held
(a conference outside the
(hearing of the court reporter.

(R.413-16)

. . .

A The car—

MR. GRAHAM: Your Honor, he is leading the witness.

Q Just describe the car?

THE COURT: Don't lead the witness.

MR. RODRIGUEZ: Yes, sir.

A Like I said, a 1970 Chevrolet, blue over white, four-door.

Q Just Describe the car?

A The car was extremely dirty with what appeared to be some kind of road film.

MR. GRAHAM: Objection, Your Honor. That calls for a conclusion on the part of the witness.

THE COURT: Be overruled.

MR. GRAHAM: Note our exception.

(R.420-21)

. . .

MR. GRAHAM: Objection, Your Honor. The district attorney is testifying.

THE COURT: Don't lead.

MR. GRAHAM: I ask the Court to instruct the jury to disregard the remarks of counsel as not being testimony in the case.

THE COURT: The Court will instruct the jury to disregard the last statement made by Mr. Rodriguez.

MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicial as to require a mistrial.

DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel—

THE COURT: I denied the motion for mistrial. Overruled.

MR. GRAHAM: Jesus Christ.

Q This same car that you testified as to your having observed at 10:50 p.m., is that the same car, same license plate number as you saw at the residence of Carl Wiggins?

A Yes, sir, it is.

MR. RODRIGUEZ: Thank you, sir.
Pass the witness.

DEFENDANT: No questions.

(R.421-22)

. . .

THE COURT: Outside the presence of the jury.

MR. GRAHAM: I would like to be permitted by the Court to examine this witness.

THE COURT: That's entirely up to him. Again, that's a judgment call and ...

(Thereupon, conference held
(between Mr. Graham and the
(defendant.

MR. GRAHAM: For the purpose of the record, let the record reflect that counsel, appointed counsel for the defendant, R. Norvell Graham, Jr., and Benjamen Sample, have advised the defendant that the establishing of a tainted in-court identification is a legal proposition and should be handled by an attorney outside the presence of a jury and notwithstanding our advice and counsel with him, the defendant refuses to allow either counsel to interrogate the witness concerning the tainted identification, and for all those reasons counsel feels that his record is necessary.

(R.427-28)

. . .

Q Which one do you see?

MR. GRAHAM: At this point I would like to take the witness on voir dire to establish whether or not her recollection is from what she saw that day or from some other source.

THE COURT: Counsel, I will be glad to let you do that except ...

DEFENDANT: I didn't quite understand that.

THE COURT: He wants to take him on voir dire to establish the source or something else, and, as I understood from what you just put into the record just before we started this, was that the defendant was insisting that it was a judgment call and that he would conduct his own interrogation.

MR. GRAHAM: I am just trying to advise him that now is the time.

THE COURT: Okay.

(R.430)

. . .

DEFENDANT: Note my exception, Your Honor.

MR. GRAHAM: Before the jury is brought in, I would like to make a brief statement in the record.

THE COURT: All right.

MR. GRAHAM: Comes now R. Norvell Graham, Jr., and Benjamin Sample, court-appointed attorneys for the defendant, outside the presence and hearing of the jury, and state for the purpose of the record that had they been allowed to interrogate the witness they would have pointed out that the occurrence of the offense in question was January 17, 1972; that this witness was not talked to about this robbery until almost one month later, which was February 15, 1972; that a discrepancy in her statement as to it being a black pistol as opposed to it being a rusty pistol, as testified to by the other identifying witness, would possibly raise a reasonable doubt; that if the attorneys had been allowed to interrogate the witness they would have asked that the witness describe the robber that she saw on that date, as

to what clothing he had on, as to his height, his weight and other pertinent observations she may or may not have made as to whether or not there were other witnesses in the immediate vicinity of the robbery, as to whether or not she was able to ascertain—whether Mr. Davila actually was able to see the car that the defendant left in, as to whether or not he was able to see the color of the defendant's car that the defendant left in, and other pertinent questions which counsel for the defendant were prevented from asking.

THE COURT: Let the record further reflect this is additionally a judgment call on behalf of the defendant conducting his own defense.

DEFENDANT: Your Honor, I would like for the record to reflect that I object to the witness being called on rebuttal since the defendant offered no testimony relative to identification, and this witness to be gone on rebuttal would be improper, I think, and I would object to the State presenting this witness as a rebuttal witness.

THE COURT: All right. That will be overruled.

DEFENDANT: Note my exception, please.

THE COURT: All right. Bring in the jury.
(Thereupon, jury brought into
(the courtroom.

(R.449-450)

. . .

MR. GRAHAM: May I interject a statement?

THE COURT: You may.

MR. GRAHAM: Counsel R. Norvell Graham, Jr., and Benjamin Sample, court-appointed attorneys for Carl Edwin Wiggins, in connection with the portion of the Court's charge which advises the jury that they cannot consider his failure to take the stand as any evidence of guilt, state that they have counselled with the defendant, advised him of the desireability of including that in the charge and advised him of the possibility of a jury discussing the failure of the defendant to take the stand and further advised him that if that were included in the charge, their discussion of his failure to take the stand would be reversible error; that, notwithstanding this, the defendant elected to remove the same from the Court's charge.

Mr. Wiggins, I want you to tell the Court how you want this argument.

(Thereupon, conference is held
(outside the hearing of the
(court reporter.

(R.478)

. . .

THE COURT: Have you decided on your order?

MR. GRAHAM: Mr. Wiggins desire that I make the opening statement for the defense.

DEFENDANT: Yes.

(R.486)

. . .

MR. GRAHAM: I object to the reasons they don't know or should not know. That's highly improper.

THE COURT: Ladies and Gentlement of the jury, you consider and base your verdict entirely upon the evidence that you heard.

MR. GRAHAM: Request the Court instruct the jury not to consider this thing about things they don't know or should not know.

THE COURT: All right. You are not to consider other matters or speculate about other matters that are not before you.

MR. RODRIGUEZ: Exactly.

MR. GRAHAM: Your Honor, I would like an instruction to the jury to disregard the remark of counsel.

THE COURT: All right. I will instruct the jury to disregard the last statement of counsel.

MR. GRAHAM: Notwithstanding the Court's instruction to the jury to disregard the remark, the remark is so highly prejudicial as to require a mistrial.

DEFENDANT: Your Honor, the defendant doesn't desire a mistrial.

THE COURT: Motion for mistrial denied.

(R.498-99)

. . .

MR. GRAHAM: Objection, Your Honor. That's not evidence in the record.

THE COURT: Ladies and Gentlement—

MR. RODRIGUEZ: The heck it isn't.

THE COURT: Ladies and Gentlemen, you will decide or render your verdict based upon the evidence you heard. Statements of attorneys from either side is not evidence in the case.

(R.501)

. . .

(Thereupon, the Court came to
(order at 11:20 a.m., June 8th,
(1973, at which time the
(following proceedings are had
(outside the presence of the
(jury.

MR. GRAHAM: I need to dictate a statement into the record.

Comes now the court-appointed attorneys for the defendant, R. Norvell Graham, Jr., and Benjamen Sample, and state into the record that they advised the defendant, Mr. Carl Wiggins, that it was their desire at this time to make a motion for mistrial. Mr. Wiggins, after being advised of the options in law has declined to allow the attorneys to make a motion.

THE COURT: The Court will be in recess.

(R.512-13)

. . .

MR. RODRIGUEZ: Let me have these two marked.

MR. GRAHAM: Your Honor, before we go any farther and before displaying it to the jury, I would suggest that the State of Texas introduce it into evidence, as he is supposed to do so.

THE COURT: I think they are still identifying.

MR. GRAHAM: I object to it being displayed to the jury by the witness.

MR. RODRIGUEZ: Introduce what into evidence. I am sorry.

MR. GRAHAM: State's Exhibit No. 5.

MR. RODRIGUEZ: Okay. I will offer it into evidence.

THE COURT: Do you have any objection?

DEFENDANT: What is it? These fingerprints here? No, I have no objection. I have no objection.

(R.522-23)

. . .

MR. GRAHAM: Do you have any objection?

DEFENDANT: To what?

MR. GRAHAM: To the cards?

DEFENDANT: Yes. I have objections. To the court, no.

(R.524)

. . .

MR. GRAHAM: We object to this testimony, Your Honor, on the grounds that no proper predicate has been laid for these exhibits that the district attorney has submitted to this witness, and that the same is not the best evidence.

MR. RODRIGUEZ: I haven't offered it into evidence yet.

THE COURT: Just identify them.

MR. GRAHAM: Your Honor, I object to the testimony.

THE COURT: They will not be displayed to the jury.

MR. GRAHAM: I object to him testifying from them until time as the defendant has had an opportunity to know what they are.

THE COURT: He can testify concerning them, and lay a predicate.

Q Yes, sir. State's Exhibit No. 5 are the known prints of the defendant, is that right?

A The prints I took yesterday, yes, sir.

Q Now, State's Exhibits 6 and 7 ...

MR. RODRIGUEZ: Go ahead, go ahead.

MR. GRAHAM: I would like to object on the grounds that the defendant doesn't know what he is looking at, and for him to state from the witness stand what it is is not proper until such time as the defendant has had—

THE COURT: The witness is instructed not to state what it is.

MR. RODRIGUEZ: I will tender them to him right now or when I offer them into evidence, whatever his pleasure is.

THE COURT: Do you want to see them right now?

MR. GRAHAM: I am not going to presume to tell the district attorney how to try his case.

THE COURT: He is asking if you want to see them right now?

MR. GRAHAM: If I want to see them?

THE COURT: Yes, examine them, right.

MR. GRAHAM: Is the district attorney proposing to offer into evidence what the witness is looking at?

MR. RODRIGUEZ: I am going to offer it into evidence whenever I have laid the proper predicate and not before.

MR. GRAHAM: Well, Your Honor—

MR. RODRIGUEZ: I will tender them to him at that time or right now, whatever his pleasure is.

THE COURT: All right. Continue with your predicate.

Q All right. Now, Have you had occasion to compare the known prints of the defendant which are on State's Exhibit No. 5 with the unknown prints contained in the latter portions of State's Exhibits 6 and 7?

A Yes, sir.

MR. GRAHAM: I will object then, Your Honor, to this continued reference to what's contained in these exhibits when the defendant hasn't had an opportunity to examine them, the State has not offered them into evidence.

THE COURT: That will be overruled.

MR. GRAHAM: Note my exception.

(R.524-26)

. . .

MR. GRAHAM: Objection, Your Honor. Just a moment. Before we go any further into this, I would like an opportunity to question this witness on voir dire concerning what he is looking at there.

THE COURT: I am going to deny that.

(R.527)

. . .

MR. GRAHAM: Your Honor, I want to object—

MR. RODRIGUEZ: Object.

MR. GRAHAM: —now to this line of argument and object to these convictions on the grounds that the convictions for burglary and theft over fifty in Cause No. 46140 and 46298 arose out of the same confession and, therefore, he could not under the law then be convicted of the same offense and the same thing applies to—

DEFENDANT: Your Honor, I want to object to the fact that these are convictions of someone, but he is saying they are convictions of the defendant. He hasn't proved that these were convictions—

MR. GRAHAM: Will the Court rule on my objection first?

THE COURT:All right. Objection is overruled.

MR. GRAHAM: Note my exception.

(R.536-37)

. . .

MR. GRAHAM: Objection. That's out of the record.

THE COURT: All right. I will sustain the objection.

MR. GRAHAM: I would like for the Court—

THE COURT: The Court will instruct the jury to disregard the last statement.

MR. RODRIGUEZ: What's outside the record?

THE COURT: That he is walking the streets right now.

MR. GRAHAM: Notwithstanding the Court's instructions, the outburst by the district attorney is so prejudicial as to require a mistrial and respectfully moves for same.

THE COURT: The court has instructed the jury to disregard the last statement for any purpose whatsoever.

The motion for mistrial is denied.

MR. RODRIGUEZ: Okay. A little technicality like this—

MR. GRAHAM: The motion is overruled?

THE COURT: Denied; overruled.

(R.539-40)

. . .

MR. GRAHAM: I object to counsel referring to this as eighty-five years. Counsel well knows these things run concurrent.

MR. RODRIGUEZ: That's not in the record. Sit down.

MR. GRAHAM: In the absence of it being in the record, it is presumed that he got concurrent sentences, unless it appears in the record that the sentences were stacked, he got concurrent time.

I object to counsel arguing that he got eighty-five years. I think it's highly prejudicial. I respectfully—

THE COURT: Ladies and Gentlement of the jury, as stated previously, statements of the attorneys from either side are not evidence in the case. You are to make your decision based upon evidence.

MR. GRAHAM: Notwithstanding that, I would ask that the Court instruct counsel not to refer to the man's getting eighty-five years.

MR. RODRIGUEZ: What's it total up to?

MR. GRAHAM: May I state my objection, Counsel?

THE COURT: Go ahead, Counsel.

MR. GRAHAM: I object to counsel trying to mislead the jury saying that the man got eighty-five years when in truth and fact he got three sentences concurrent time, the maximum of which is—

DEFENDANT: In truth and in fact, I believe counsel to—I believe I will object to counsel on that.

MR. GRAHAM: I withdraw it.

THE COURT: All right.
(R.543-45)

. . .

(Thereupon, jury brought into
(the courtroom.

THE COURT: Mr. Wiggins, do I understand that you are waiving the presence of Mr. R. Norvell Graham?

DEFENDANT: Yes, sir, it is all right.

THE COURT: Well, he is available and can be here in six or seven minutes.

DEFENDANT: No, it won't be necessary.

THE COURT: All right. But you understand that we can make him available. I will suspend proceedings until he is here, if you wish that.
Mr. Sample?

DEFENDANT No, I don't desire him.
(R.546-47)

COURT: It is now in the record that he has given notice of appeal in open court.
MR. WIGGINS: Your Honor, I would like for it to reflect in the record that the defendant is defending himself and has not asked for or requested the assistance of counsel and the defendant would like to defend himself.
COURT: Let me understand this. You are at this point asking or moving this court that Mr. Graham and Mr. Sample be relieved of their appointment to represent you?
MR. WIGGINS: Your Honor, I asked to waive counsel and defend myself back in ...
COURT: I'm not asking that. I am asking from this point forward are you asking that they be relieved?
MR. WIGGINS: Yes, sir. Any court appointed counsel be relieved and permit me to defend myself on appeal

and that I might obtain the records and write my own brief and appeal my own case.
COURT: And you do not wish any counsel of any kind?
MR. WIGGINS: No, sir.
COURT: You do not wish a continuation of your present appointed counsel which are numbers 9 and 10?
MR. WIGGINS: The defendant has not asked for any of this as the defendant does wish to appeal this case by himself and to have a copy of the record and write his own brief and submit it.
COURT: I will do this, Mr. Wiggins. I will make available to you all of the opportunity in the world to write your own brief and have the transcript of the proceeding, both the statement of facts and the record on appeal. I'm going to reserve decision on your motion to relieve counsel at this point until I check the constitutional grounds but until I do that I instruct your court appointed counsel not to in any way interfere with you and I will advise you of the court's decision here in a day or so.
MR. WIGGINS: Thank you, your Honor.

(R.572i-572j)

. . .

REQUEST FOR COURT APPOINTED ASSISTANCE

No. 73-CR-648

4-16-73

Dear Sir:

I wish to *rescind my* earlier *request to waive* court appointed *assistance counsel* - and request *that this honorable* court appoint *counsel* to assist me.

I would appreciate very much if the Court would appoint the Honorable Stewart J. Alexander who was previously appointed to assist on appeal, before sentence was set aside.

And I apologize if I have caused an inconvenience to the Court.

Very truly yours,

Carl Edwin Wiggins

(R.854)

. . .

REQUEST THAT COURT APPOINT COUNSEL

No. 73-CR-648

5-26-73

To The Honorable Archie Brown,
144th Judicial District Court
Bexar County, Texas 78204

Dear Sir:
I have been indicted four (4) times of the same offense—and tried and convicted on the 2nd indictment, Cause No. 72-1141. The judgment and sentence was set aside and the Cause, No. 72-1141, was dismissed, and then was re-indicted twice more, Cause No. 73-CR648 and 73CR-653, accusing me of the same offense the 3rd and 4th times. And I am scheduled now to be tried again under the last two indictments.

According to Higgins v. State and Snow v. State, where prosecutions were dismissed—and according to VACCP Art. 28.13, I shouldn't be tried again.

Will you please appoint counsel to cite authorities on this issue, also, in favor of the State. I find only authorities indicating that further prosecution is barred. None indicating otherwise.

Respectfully yours,

CARL E. WIGGINS

(R.623)

. . .

Dear Judge Benavides:
On November 21, 1973, a gentleman from the courthouse came to the county jail and asked me if I wanted legal assistance. He told me you sent him. I said that I did need legal assistance and signed the affidavit indicating that I was unable to pay for assistance counsel.

Will you please advise me who the court appointed so that I may be able to contact him and discuss the aspects of my cause with him.

Also, may I inquire as to when a hearing may be held on the original application for writ of habeas corpus that I improperly filed with the Court of Criminal Appeals, and which was redirected to your court on Nov. 19, 1973.

I would appreciate your assistance.

Thank you,

CARL E. WIGGINS

(R.807)

AFFIDAVIT

My name is Carl Edwin Wiggins, and I am currently serving a life imprisonment sentence as a result of conviction in the 187th Judicial District Court of Bexar County, Texas, upon the third (3rd) of four indictments that were presented against me by three different Grand Juries for the same single alleged criminal offense. The four (4) indictments charging me with an alleged robbery of some three hundred dollars was said to have occurred on or about the 17th of January, 1972, a date that I was in Corpus Christi, Texas—about one hundred and eighty miles from the scene—where my home and business was, and was with several witnesses who were ready to testify that I was with them on the date in question and at the time in question.

The indictments that were presented against me were numbered: 72-777, dated April 19, 1972; 72-1141, dated June 7, 1972; 73-CR-648 and 73-CR653, dated March 28, 1973. The Grand Juries were given absolutely no evidence or witnesses on which to base these presentments.

During the trial of this cause, (73-CR-648), after having elected to conduct my own defense—out of necessity—I was forced to accept the "services" of two Court appointed Lawyers. These two Court appointed Lawyers, as were others before them, were part of the prosecuting scheme. I was actually required to defend myself from these lawyers more than from the charge in the indictment. The experience was truly incredible.

I am making this affidavit mainly to describe some of the conduct of these lawyers.

After I was arrested at my home in Corpus Christi, Texas on February 20, 1972, and taken to San Antonio and charged with the January 17th, 1972 robbery, my wife immediately inquired with relatives as to the best

lawyer to contact in San Antonio. Mr. Fred Seamann was recommended. In the meantime, the first few days I was in the Bexar County jail, a Mr. Thomas Rocha was recommended to me as a good lawyer and Bondsman. Mr. Rocha came to the jail and told me that for Five Hundred dollars ($500.00) he would get me out on bond and then talk about fees to defend me from the charge. The following visiting day I told my wife to see Mr. Rocha. She had brought all the money we had in the bank—which was about seven hundred dollars ($700.00). I advised her to hold on to the money unless it was a sure thing that I could be released on bond. She was pregnant at the time and we had kids in school. We could not afford to give up all our money unless I could be out to work and bring in an income. I had a Battery Shop in Corpus Christi in which I earned from two hundred and fifty to three hundred dollars per week. We had good credit at the Bank (Corpus Christi State National). When she met Mr. Rocha, he told her to give hime the money (Five Hundred dollars) and for her to wait in the parking lot while he went into the Courthouse and talked to the judge. This was contrary to what he had told me earlier when he said he wanted the judge to see my wife's pregnant condition. My Wife told Mr. Rocha that she would have to see me before she gave him the money. When she came back to the jail to see me that same day, after Mr. Rocha has arranged for us to have a "special" visit, I told her not to give him the money until after the bond was made—the minute after. And, based on the descriptions my Wife gave me about Mr. Rocha's conduct, I told her that I thought he was less than honest, and to be careful about giving up our money. Later she told me that Mr. Rocha wanted her to give him the money and for her to come back in a few days. She didn't give it to him. She went to see Mr. Fred Semann. Mr. Semann told her that he had to have Five Thousand dollars in advance for legal services and more for making the bond which was set at thirty thousand dollars. The next time she saw me I told her to

forget about any Lawyer; that a line-up should clear me. This was what the Parole Office told me, because he said my description was nothing like that of the robber's description. But a line-up was never held.

Judge Benevides of the 187th District Court appointed Mr. Fred Semann after I signed a "pauperis affidavit," stating that I was too poor to hire Counsel. No request was made with the Court for the appointment of Mr. Semann. His name just coincidently came up in the alphabetical order on the calender of the Court. (This was according to Judge Benevides).

I had not know that Mr. Semann had been appointed at the time I was allowed to call home from the jail. When my wife answered the telephone she was crying almost hysterically. She told me that Mr. Semann had called her and cussed her out because she had gotten Judge Benevides to appoint him to my case. She had not known about the appointment; had made no contact with Judge Benevides whatever.

A few days later Mr. Semann filed a Motion with the 187th District Court to be dismissed from my case. Judge Benevides granted the Motion and apoligized to Mr. Semann, explaining about the alphetical order system on his calender for appointing Lawyers. This occurred about March 15, 1972. No other Lawyer was appointed until late in August, 1972.

On April 19th, 1972, I was indicted as cause number 72-777, charging me with the robbery of one Melvin Baumann on or about January 17, 1972.

On May 18th, 1972, the indictment was dismissed and I was released from the Bexar County jail. That same evening before I was released, Mr. Rocha came to the jail and called me out to the Attorney Room. He told me that he could file a motion for dismissal if I wanted him

to. I advised Mr. Rocha that I had been kept in jail for three Months and that I did nothing against the law. I advised him that numerous witnesses in Corpus Christi had long ago tried to give statements and come to San Antonio to testify that I was with them in Corpus when the alleged robbery had occured, but that they were not allowed to do so and their statements were refused by the D.A.'s investigator who had went to Corpus and talked to the witnesses. By this time we had lost our home—which we were buying, our Battery Shop, our credit ruined, the kids had to be taken out of school and moved to Fort Worth near relatives, and my Wife had suffered a nervous "break-down," and our 5th Son was born while I was kept in jail. Because I did absolutely nothing against the Law; and was kept in jail for three Months while they knew I did not commit the robbery accused of; I told Mr. Rocha that I was going to file a lawsuit against the D.A.; that I did not want a dismissal; that I wanted a trial where I would very easily clear myself. I said this and much more to Mr. Rocha. His client, Ronnie ? whose last name I can not recall at this moment, Donnie Perryman was present and heard it all. About three hours later I was released and told the charge had been dismissed.

I went to Fort Worth where my Wife and Children had moved into a rented house. I told my Wife that I was going to file a lawsuit against the Bexar County District Attorney. She pleaded with me not to do so. I contacted two Lawyers in Fort Worth. First Mr. A.L. Wardlaw and then a Mr. Thompson who was in the same building. (Union Bank Bldg). Mr. Thompson heard me through and said we had a pretty good case to file. He told me to get hold of a Mr. Rudy Rice in San Antonio, and he would contact him for me initially to brief him on the circumstances. I told Mr. Thompson that I first had to try to re-establish my business in Corpus to establish an income—and then I would go see Mr. Rudy Rice.

The latter part of May, 1972, my Wife and I went back to Corpus Christi to try to find another place for a Battery Shop and a place to live. While we were there we talked to my parole Officer, Mr. Davidson, and I asked him if we shouldn't file a suit against the Bexar County District Attorney. He said we should. We then visited with Mr. and Mrs. Lee Beasley—who were two witnesses that I was with in Corpus Christi on the date of January 17, 1972, and at the time of the robbery in San Antonio. After they described to us the conduct of Mr. Billy Cunningham, the investigator for the Bexar County D.A.'s Office, who they said, tried every way in the world to discourage their testimonial support, I decided for sure that I would file a suit as soon as I could establish an income. According to the Beasleys and other evidence all put together, Mr. Billy Cunningham was—and is—guilty of criminal fraud.

While I was trying to get the Battery business re-established in Corpus, I got word from San Antonio on two different occassions that "they are thinking about re-indicting." I told my Parole Officer, Mr. Davidson, to tell the San Antonio Parole Officer, Mr. Sagert, who had conveyed the re-indictment threat, that I was going to file suit regardless of what they do. The date I received the last threat of re-indictment was about June 27, 1972. Later, after I was re-arrested, the indictment presented to me was dated June 7, 1972. This was cause number 72-1141.

I was re-arrested on June 29, 1972. On about August 16th or 17th, 1972, the Court appointed Mr. Maury Maverick Jr., for assistance. Mr. Maverick came to the jail and talked with me for about 30-45 minutes. I attempted to give a full account of the circumstances but he indicated that he didn't have time to hear it all. I did give him names of several witnesses in Corpus Christi. Before he left he ask me if they offered 15 or 20 years for a guilty plea would I take it. I told him that I didn't

commit the offense and would not—and could not—plead guilty. I told him that I wanted him to feel sure that I wasn't guilty if he was to defend me in Court. I asked him to talk to the witnesses and get statements from them.

On about September 1, 1972, I was brought before the 186th District Court, Judge Barlow. He and Mr. Maverick had a discussion at the bench while I sat in the jury box. I couldn't hear what they said. Mr. Maverick then came and told me that a trial date had been set for November 20, 1972. I complained that that was too long but rationalized that Mr. Maverick needed time to contact witnesses and obtain statements.

Between September 1, and November 20, 1972, Mr. Maverick came to the jail several times. Each time he suggested that I should plead guilty for 15 or 20 years, which he said, they had agreed to give me if I pleaded guilty. I kept insisting that I was not guilty and he kept insisting that I should plead guilty. At one time I asked him how, just how, can a man possibly plead guilty for something he did not do? And would he consider pleading guilty himself to the charge—because he was no less innocent than I. Finally Mr. Maverick told me if I didn't plead guilty that he would withdraw from my case. I told him to withdraw—and wrote him a letter to that effect.

Prior to the November 20th date, I prepared some motions on my own. Mr. Maverick would not consider filing any motions for me. He had reached a point of demanding that I plead guilty. The Motions that I prepared and filed with the 186th District Court—which was the Court Mr. Maverick told me that I would be tried in—were (1), a Motion to dispense with Court Appointed Counsel and be allowed to conduct my own defense; (2), a Motion for a Speedy Trial; (3) a Motion to

suppress the identification by Baumann; (4), a Motion for Discovery; and (5), a Motion to question Jurors individually.

On November 20, 1972, early in the morning before I left the jail to go to Court, Mr. Maverick approached me at the bars separating the outside lobby from jail prisoners, and motioned for me to lean closer to hear what he had to say. He said: "Now, when we get over there, don't tell the judge that you definitely wont plead guilty—like you've been telling me—tell him that you want the option left open until the last minute before jury selection." This is very close to a verbatim quote. When Mr. Maverick suggested this to me it made me angry. I told him that I would do no such thing and walked away from him.

When I got to the Courtroom, which was the 187th and not the 186th, none of my witnesses were present. Mr. Maverick had assured me that they had been contacted and would appear. To my knowledge no subpoena applications had been filed for the November 20th date. In the early stages of this ordeal I really didn't think subpoena would be necessary. The witnesses needed only to be told when to appear. Through my wife I had made contact with the witnesses and all indicated that they were ready to appear and testify. Later I was to learn that Mr. Maverick had told the witnesses not to appear on November 20, 1972, that the trial would be put off until after the first of the year. He did this, plus, it was indicated to me by some of the witnesses, that he was trying to discourage them from testifying for me. He went to one witness and suggested that "the others aren't sure about the date they were with Wiggins," or words to this effect. And then he would go to another witness individually and tell him the same thing, apparantly attempting to condition the witnesses to begin doubting with the time lapse.

When Judge Benevides called my name from the docket I stood up to answer. But Mr. Maverick jumped up and announced the following: "Your Honor, I've got witnesses in three cities in Texas, two other States, and maybe one in Germany, and we are just not ready for trial." This was an out and out lie. I interrupted and told the judge that that wasn't true; that I had been pleading for a speedy trial while the witness were still available; and that I wanted to conduct my own defense. Judge Benevides then told me that another Lawyer, in addition to Mr. Maverick, had been appointed to assist, and that he had to have time to prepare for my case. The other Lawyer was James Ingram. Judge Benevides then set a date to hear the Motions that I had filed, for December 7th, 1972.

Prior to December 7, 1972, Mr. James Ingram appeared at the jail and had a stack of papers in his hand. He said there were some motions that I needed to sign. We were standing up near the counter of the officers' cage on the 7th floor of the Bexar County jail. Mr. Ingram quickly shuffled through some of the papers and stopped on the pages that he wanted me to sign. Some were genuine motions. One was a motion to stipulate a statement by T.V. personnel that the "Bob Hope Special" was aired on T.V. in Corpus Christi at 8:PM on the 17th day of January, 1972. This was one of the elements Truman Beasley had been able to identify the date and time that I was at his home in Corpus Christi. He had remembered me being there when this particular show came on. But among the papers Mr. Ingram wanted me to sign there was another stipulation. It was a false report that someone had made out to indicate that my Son, Eddie, was stopped in the back alley of an H.E.B. store, in our car, on the night in question. Our son had been given a ticket in Corpus on that date, as he was comming out of another store in the neighborhood. He was not in any back alleys. He had simply went into the store—and it was not an

H.E.B. store—to get a bag of potato chips and a coke. When I saw this I told Mr. Ingram that that was false. He said it didn't really matter, that the important thing was that it showed our car was in Corpus Christi and not in San Antonio involved in the robbery as alleged. But I insisted that this was designed by someone to make it appear that my Son and the car were observed under shady circumstances on the same night that a robbery had been committed in San Antonio. I would not sign anything he had. He had actually tried to trick me into signing these papers, and when I caught the false one, he appeared very nervous. At this stage of this ordeal I became absolutely certain that there was a genuine conspiracy between the Lawyers and the Prosecutors Office to convict me.

On December 7, 1972, I was brought to the 187th, Judge Benevides presiding. This was supposed to be a hearing on the five Motions that I had filed. Concerning the Motion to dispense with the Court Appointed Lawyers, I took the witness stand and testified for about two (2) hours. I described the conduct by Mr. Maverick in detail and also described Mr. Ingram's efforts to trick me into signing the false report about my son. I testified that I had no choice but to defend myself—and that I felt that I had that right. Judge Benevides denied my motion to conduct my own defense and I noted my exception thereto.

As soon as I got back to the jail from the December 7th hearing, I started preparing a Writ of Habea Corpus appeal from Judge Benevides' denial of the Motion to dispense with Court Appointed Counsel and defend myself. I actually had to smuggle this document out of the jail because some personnel at the jail was stopping all my mail that had anything to do with preparing for my defense. (I filed a suit in Federal Court about this). I mailed the writ directly to the Court of Criminal Appeals. In the meantime, Mr. Maverick and Mr. In-

gram came up to the jail several times suggesting that I had an emotional problem—and always stating that "I feel very sorry for you Mr. Wiggins; and expecially about your son." Mr. Maverick had a peculiar characteristic about him. Almost invariably when he would lie about something, or attempt something false, he would follow up with some sincere sounding phrase like "I truly feel sorry for you, I know how you have suffered in this jail," and, "I can understand why you would have an emotional problem, having been through so much," Etc... On November 20, 1972, the date I was supposed to have went to trial, after Maverick announced: "Your Honor, I've got witnesses in three cities in Texas, Two other States, and maybe one in Germany," he said something like: "...I feel sorry for Mr. Wiggins—and especially his little boy ... but your Honor, I know I am right!" This was Mr. Maverick's response to my telling the Judge that what Mr. Maverick had said about witnesses in other States, etc., was not true—and that I wanted a trial. I didn't hesitate to tell Mr. Maverick that I was aware of his efforts to do me harm. He got to where he didn't deny it—or even try to hide his efforts anymore. He confided in me once that he didn't like doing what he was doing and I asked him why he as doing it. He said 'I don't want to talk about it anymore.' He was a little inebriated during some of the confrontations I had with him. Once I told him that he knew as well as I that they were determined to convict me for one reason. And that was to prevent me from filing an effective suit against the D.A.. I told him that we, my wife and Children had suffered a great deal—and we lost everything—and before they went any further with this illegal conspiracy, that I would settle now for a minimum compensation and go home to my family and forget about the whole thing. He said he would talk to them. The next day he returned to the jail and said: "Well, they turned down your proposal." I asked him who are they? He said: "I wont talk about it

anymore." He never did—except he did admit this to Chaplain Christian Kehl, the jail Chaplain who was trying to help me.

Because Judge Benevides treated my motions so arbitrarily, I had my doubts about him being a fair Judge. I devised a test to find out for myself. When Mr. Maverick and Mr. Ingram were at the jail one day I ask them if they thought Judge Benevides would allow me to defend myself if I waived the jury. They jumped on this with both feet. They began telling me all the advantages of waiving the jury—and that Judge Benevides would give me a fair trial. Mr. Maverick and Mr. Ingram both, really went overboard with this suggestion. I told them that I had not decided for sure and would decide only if I got a letter from Judge Benevides himself stating that I could defend myself if I waived a jury. The very next day I got a letter from Judge Benevides stating that if I waived trial by jury I would be allowed to cross examine and interrogate witnesses within legal limits, etc... I sent this letter to the Board of Pardons and Paroles, as I had sent several important documents to them for safe keeping. The Parole Board was the only State Agency that I had any faith in. This "test" settled any doubts about Judge Benevides. I wasn't about to waive a jury trial.

The Court of Criminal Appeals re-directed the Writ of Habeas Corpus Appeal that I had sent to them, to the 187th District Court. I received a copy of the transmittal letter sent to Judge Benevides, requesting that he hold a hearing on the issue of self defense. Judge Benevides set a hearing date for January 11, or 12, 1973. At the hearing I testified for about two (2) or three (3) hours about the conduct of Mr. Maverick and Mr. Ingram. I gave detailed testimony from notes that I had made during the Months that I had to contend with so much of their trickery and attempts to discourage my witnesses. I found it difficult—and I still

do—to describe the incongruous conduct and manner of Mr. Maverick. I introduced several letters from my Wife about Mr. Maverick; and letters by Mr. Maverick himself. He had told my Son, the oldest, who had had our car throwing his paper route in Corpus Christi during the evening in question, that "... your Father claims you had the car in Corpus Christi ... while others and Police ...claim it was in San Antonio during a robbery..." and "...your Father may have to spend the rest of his life in prison...," etc.. These letters and others were introducted while I was testifying at the January 11, or 12, 1973, hearing.

A Lawyer, Mr. Gerald Goldstein, filed a "Memorandum of Law" at this hearing. He stated that I had the right to defend myself and cited cases. Judge Benevides ruled that I could conduct my defense but would have to accept the assistance of the two Lawyers also. I insisted that Mr. Maverick and Mr. Ingram were working against me and were part of the prosecution, and that their presense alone would be detrimental to my defense. Judge Benevides stated that I was going to get their help whether I liked it or not. I objected and "excepted."

A few day after the January 11, or 12, 1973, hearing, the jail officials moved me into a solitary cell that was about four (4) feet across and six (6) feet long. This, they said, was necessary because some law books was being brought up to me for study and preparation for trial. For several days following Mr. Maverick and Mr. Ingram brought up a stream of pamplets, sheets, and one book. Each time either of them brought so much as one single sheet, they would require me to sign for it. They would not bring the one book that I requested; the Texas Code of Criminal Procedure. I was kept in that cell for some two Months after the trial.

A few days before trial, which was set for January 29, 1973, Mr. Maverick came up to the jail to talk to me. He asked me if I got out of this would I "come around his place and try to kill him." I was really taken back by this. Never once did I threaten him, or even suggest a threat. The most I ever called him was a "hypocrite." I felt such a heavy burden for him at that moment. I tried to persuade him that I represented no kind of danger to him or anyone else; that I wasn't capable of doing violence to another. But this worried me quite a lot. If he thought that I represented a threat to him., what would he do to assure his safety? I went through much contemplation about Mr. Maverick's fear. Each time I came out with nothing but sympathy for him. I was angry at him several times—and frustrated—but I've never hated him. As I think about it now, I'm sure that Mr. Maverick sensed that I could never do him physical harm. I never have inflicted physical violence upon anyone in my entire life. The "Rap Sheet" on me which reads "Manslaughter," in Okla. in 1957, involved an automobile accident. Later dismissed. I wasn't even the driver of the car.

On January 29, 1973, I was brought to Court for trial. The important witnesses were there to testify that I was in Corpus Christi on the date in question. During the Voir Dire of the jury panel, I was standing before the group when Mr. Maverick rushed up to me and said something like: "Mr. Wiggins, your son Eddie has had an accident—he's in critical condition in the hospital at Brownwood—don't you want to plead guilty for this 20 years!" He said this loud enough for some of the jurors to hear. I went to the judge and ask for a recess. I did not ask for a mis-trial pursuant to Mr. Maverick's conduct in the presense of the jury panel. It wasn't until later, upon reflection, that I realized the prejudicial effect his comment might have had on the jurors. Even though I was on guard for anything the Court Appointed Lawyers might do, knowing full well at this

stage that they were deliberately working against me, I was unable to cope with much of their conduct, and some things they did.

After thirty two (32) prospective jurors were selected, I was taken, in handcuffs, to a side room to the court to make the ten (10) pre-emptory challanges. I took the strike list and made my ten (10) strikes holding my left hand over my writing, not allowing the Court Appointed Lawyers to see the names that I was striking from the list. They, especially Maverick, talked to me a lot while I was deciding which jurors to strike. I asked Mr. Maverick to leave me alone. I had told them both that I would not allow them to see the names that I decided to strike. After I finished and signed the strike list, and turned it over in front of me, Mr. Ingram, who was standing across from where I was seated on the other side of the table, reached for the list and said he would take it out to the Clerk. I told him no, that I would take it out myself and turn it in at the same time the Prosecutor turned his list in. They both laughed at me. While Mr. Maverick was getting my attention, talking about the witnesses to call, advising me to call all the Police witnesses from Corpus Christi, Mr. Ingram reached across the table and grabbed the strike list and rushed from the room. I hollered at him but he didn't stop. Mr. Maverick, who was seated to my left, started talking to me, playing the situation down, and assuring me that everything was O.K.. Mr. Ingram came back in a few minutes and told us that "they didn't cross a one." I went out to the Courtroom a few minutes later and ask for a mis-trial. Judge Benevides said he was present when Mr. Ingram brought out my list and said: "they didn't cheat, I watched them." I filed a written "Bill of Exception" to this particular incident. With 32 prospective jurors qualified, less the 10 I struck, the Prosecutor picked the jury from a panel of 22.

At the outset of this trial in cause number 72-1141, comming nearly one year from the date of my initial arrest, despite my repeated requests and demands for a Speedy trial, I realized that someone in the Bexar County District Attorneys Office had gone to a lot of trouble, had committed fraud, and had gone too far to allow me to get an acquittal. This worried me, but my witnesses were there and I felt confident. At the beginning, however, one witness, Mr. Truman Beasley who was Assistant Advertising Director for the Corpus Christi Caller Times, was not subpoenaed. Some of his relatives were there and I asked them to call him. They did, and Truman Beasley advised them that he would have to have a subpoena before he could leave the job. Since Truman Beasley was a key witness to my defense, (He testified that I was with him at my home at noon on the date in question and I was at his home that evening at about 8 PM), it was apparant that they, the conspirators, were attempting to keep Mr. Beasley from the trial. I announced in open court that I wanted the witness subpoened and if necessary, an attachment. Truman Beasley appeared the next day and testified. During a recess, while I was locked in a hold over cell near the courtroom, Truman Beasley came over to the window and talked with me through the little speakers just below the window. He told me that Mr. Maverick had talked to him several times—and that he got the impression that Mr. Maverick was trying to discourage him to testify for me. Lee Beasley, the brother to Truman, told me about the same thing. All the witnesses told me that Mr. Maverick had told them not to appear for trial on November 20, 1972; that the trial would be set off until after the first of the year.

Throughout the proceedings of this trial, January 29, 30, and 31, 1973, Mr. Maverick interrupted me with suggestions. On several occassions he handed me copies of the false report made out on my Son, which indicated that he had been stopped in the back alley of an H.E.B.

store in Corpus Christi on the same night of the alleged robbery in San Antonio. He insisted that I introduce this as evidence that my car was in Corpus Christi on the night in question. That report indicated that my son was stopped by Corpus Christi Police at about 10 PM under those circumstances. Actually,he was stopped at a neighborhood store as he came out with a coke and potato chips. He was never in any back alley. The report was made out falsely to suggest that my son and car was observed in Corpus Christi under shady circumstances on the same date of the alleged robbery in San Antonio. This was designed to force me to forego evidence that, if presented in the true perspective, would have been helpful to my defense. To establish that my son and car was in Corpus Christi; that my son used our car to throw his paper route on the evening in question; I would have been required to submit a false report—or see the Prosecutor submit it—that would indicate that my son was observed in the back alley of an H.E.B. store in Corpus Christi. They had a Policeman from Corpus Christi to testify to this false report. They knew our son was in the hospital and unable to attend the trial. The records—the genuine records—on file with the Corpus Christi Police Department show that our son was stopped as he was comming out of a neighborhood store (Not an H.E.B.) on the evening in question. The street address on the ticket issued my son on the evening in question is not even the same street as the H.E.B. store. This bit of fraud, I'm sure, was the "genius" work of Maury Maverick. He had numerous copies of the false report during the trial, and on two successive occassions he handed me copies trying to persuade me into introducing the same into the evidence. Each time I pretended courtesy and thanks to him and stuffed the reports in my folder. Because of the circumstances, I felt that I needed to at least pretend, for the jury, that the Court Appointed Lawyers were assisting me. I knew I couldn't just get up and try to tell them the truth; that the Lawyers were working with the Pro-

secutors. They would have thought I was some kind of "nut." At another time Mr. Maverick tried to introduce the false report himself. I grabbed it and told Judge Benevides that I did not want to it. I kept that copy also. Later I sent one or two copies of the false report to the Board of Pardons and Paroles in Austin. I know that sooner or later I will be able to prove that this was a falsified report. (If the Board has kept all the records that I sent them, and I intend to subpoena them if I ever get a hearing, there should be substantial evidence to prove some of my allegations).

During this trial, on January 29, 30, 31, 1973, on two separate occassions, very unusual circumstances occurred that had to have been pre-planned between the Lawyers, the Prosecutors and Judge Benevides. When the Complaining witness, Melvin Baumann, took the witness stand, I immediately ask for a hearing out of the presense of the jury to examine the witness on pre-trial identification procedures utilized by police with photographs. As soon as I asked for this hearing out of the presense of the jurors, without one word being said, Judge Benevides began motioning with his hands. With this motioning, and nothing more, the Court Reporter, Lois Sulsar, the Prosecutors and Lawyers, began forming a huddle to the left of Judge Benevides' chair. They motioned for me to come over there. The jurors sat and watched. I was totally dumfounded by this. They, Judge Benevides, the Lawyers & Prosecutors, huddled around the Court Reporter, heads down, talking something, just meaningless words that I couldn't even understand, while the Court Reporter took down something that would propably be put into dialogue later. I bent over once to hear Judge Benevides say: "Motion denied and overruled," and that ended the "hearing." This same thing occured later when the Prosecution called Patricia McCray, the 12 year old girl who testified that she was present when the alleged robbery occured; and was there when the Police arrived, but

didn't talk to them; and when she was back in the store some two weeks later, an employee just happened to walk up to her and ask her if she was present when the robbery occured; she said she was and two more weeks—or "a Month" later two Detectives came out to her trailer home and brought some pictures from which she said she identified my picture. In this huddle-hearing I objected strongly to their use of a child swearing under oath falsly; that she may have realizations later on in her life and experience feels of guilt. There is no question, she was induced, knowingly, to bear false witness under oath to God. That they would use a child to do this, put me on notice that they would do anything—absolutely anything.

During the afternoon of the second day of this trial of cause number 72-1141, after all the testimony was in, judge Benevides ordered a recess for the day. He instructed the jurors to go home and return the following morning at 9:AM. I objected to their separation and requested the charge be read and the jury sequestered for a verdict. It was around 4:PM. I was sure they, the jurors, would be gotten to. They were, by Mr. Maverick. The next morning they returned and deliberated for 7 minutes for a guilty verdict. I requested judge Benevides to allow me to ask the jurors if anyone had contacted them outside the Court and he refused. I then requested that he ask them and he refused this, instructing me to "consult your Court Appointed Lawyers." I then ask Mr. Ingram and he shook his head saying it wasn't allowed. Then I ask Mr. Maverick and he said: "write them letters." Believing for certain that the jurors had been contacted outside the Court and influenced in some way, by someone, to believe, or think, that I was guilty, I began work to get someone to interview those jurors to find out how they were influenced and by whom. A few days after the trial a small article appeared in the newspaper indicating that the jurors considered a prior conviction in my case before finding

me guilty. Subsequently, I was able to get some of the jurors back into the court to testify. On March 2, 1973, Juror Robert Brooker, of 243 West Ware Blvd., San Antonio, Phone No. 922-6596, testified that he had been contacted by Mr. Maverick. He let this slip out when I ask him "when did Mr. Maverick contact you? When I asked him to explain Mr. Maverick's reason for contacting him; what he had said, etc., Mr. Brooker would not answer, he put his head down, and was extremely embarrassed. Judge Benevides stopped me from questioning Mr. Brooker and I never got any answers to my questions. The records of this hearing, I think, were destroyed. I included these in my request for designated matter for inclusion in the record on appeal but I didn't get them—as well as other missing matter that I had requested.

Also, on March 2, 1973, I questioned another juror named Elias Bernal, of 526 Park Field Dr., San Antonio, phone no. 674-3084, and when I ask him if Mr. Maverick had contacted him outside of the Court, he hesitated a long time before answering that he hadn't.

About two weeks after the March 2, 1973, hearing, I received word from an Officer who worked at the jail that two of the former jurors had indicated to him that they would appear in Court and testify that they had been contacted and influenced in their verdict and/or that the Jury Foreman, Marvin E. Nation, during the 7 minutes deliberations, passed around "some kind of rap sheet indicating the criminal record of the Defendant." From this, I filed an Application for writ of Habeas Corpus in the 73rd Judicial District Court, The Honorable James Onion, requesting a hearing where two former jurors could appear and testify. I also asked Judge Onion to appoint Assistance of Counsel, hoping that I could get some honest assistance. I believed the Criminal District Courts in Bexar County were totally corrupted. I was desparate to find an honest Judge in Bexar County. I believed Judge Onion was.

A few days after I filed the Writ in the 73rd District Court, Judge Onion Appointed an Attorney named Stewart Alexander. Mr. Alexander came to the jail and talked to me. He said he would talk to the jurors and if they indicated there was jury mis-conduct he would request a hearing. Within a week thereafter I was taken to the Magistrate and advised that I was charged with the same alleged offense that I was then convicted of and on appeal. This was on March 22, 1973. I told the Magistrate, Judge Gutierrez, that I was then convicted of that charge and on appeal; and that I had already been indicted twice for that same charge as cause number 72-777 & 72-1141. He ask me if I wanted an Examining trial, and I told him that I did. But I never got an Examining trial. The following day, March 23, 1973, I was taken to the 187th District Court. A Lawyer named Patrick Burke, whom I had never met, had filed a motion, without my knowledge, to "Set aside the Judgement & Sentence, to grant a New Trial on the Court's own Motion," Etc.. Judge Benevides had Appointed Mr. Burke for this purpose only. I was on appeal and I did not ask for the appointment of Patrick Burke. Also, at this hearing, Judge Benevides dismissed the cause and ordered me discharged. At this stage Judge Benevides did not have the authority to dismiss the cause or order my discharge. Only the Court of Criminal Appeal could have legally did this. Notwithstanding his order to discharge me, I was kept under arrest, returned to the jail, and the following week, on March 28, 1973, was presented with indictments 73-CR-648 and 73-CR-653, charging me twice more with the same alleged offense.

Mr. Stewart Alexander came back to the jail and advised me that the writ was now moot since the conviction had been removed. He gave me some legal advise, impressed me as being sincere, and left. Later, after the third and fourth indictments, I requested Judge Archie Brown to appoint Mr. Alexander to assist me. Judge

Brown appointed another Lawyer named Ben Samples instead. Ben Samples assisted Norvel Graham and the prosecution in the subsequent trial and re-indictment No. 3.

On about April 13, 1973, I was brought before the 144th District Court, Judge Archie Brown, for Arraignment on the two indictments, cause numbers 73-CR-648 & 73-CR-653. Except for the numbers the two indictments were identical and represented numbers three (3) and four (4), presented by three (3) different Bexar County Grand Juries, charging me with the same alleged offense that I had no more knowledge of than the POPE. It became obvious to me that Bexar County Grand Juries were controlled by the D.A.'s Office. (During the two trials I ask each witness if he or she appeared before any Grand Jury and testified. Everyone answered no.). I requested that the indictments be read and that I be allowed to plead to them. Judge Brown ordered the Clerk to read them one at a time and to each I pleaded not guilty. Judge Brown asked me if I wanted a Court Appointed Lawyer and I told him that I did not. But later I requested that Stewart Alexander be appointed. Judge Brown appointed Benjamin Samples instead. On one other occasion, because I was unable to obtain any law books for legal research, I wrote Judge Brown to appoint a Lawyer to prepare a memorandum of Law on the issue in connection with the multiple indictments and a second prosecution for the same alleged offense. I received no response from this request.

A trial date was set for June 4, 1973, in the 187th District Court, on the cause numbers 73-CR-648 & 73-CR-653. Judge Richard Woods was sitting for Judge Benevides who was in the Hospital. The Prosecutor, Fred Rodriquez, indicated to Judge Woods that he would try me on cause numer 73-CR-648. I asked that the other, the 4th, cause number 73-CR-653, be dismissed. Judge Woods said he would get to that in time. But

cause number 73-CR-653 wasn't dismissed until several Months after this second trial and conviction. I was kept in the Bexar County jail until March, 1974, while on appeal, demanding that I be transferred to the Texas Department of Corrections while appeal was pending, like everyone else was who had a sentence over 15 years. The Jail Administrator called the 187th Clerk and asked why I shouldn't be transferred to the TDC and the Clerk told him that I was going to be tried on that other indictment in three or four Months. I showed the indictments to the Jail Administrator and he said I could use the telephone to call the court Appointed Lawyer, Ben Samples (Who had told me that the indictment had been disposed of). When I called Ben Samples, he advised me that "they arn't going to dispose of that indictment until they are sure the conviction will stick on that other one." I told him that they were all absolutely crazy and hung up. I was kept for nine (9) Months in the Bexar County jail, after the second trial, on the fourth indictment, cause number 73-CR-653, which alleged the same identical, word for word, accusation as the other three (3) indictments. Their purpose was to keep me and control my efforts. There were times I believed they would have me killed because of the criminal fraud they had committed. I still think they considered this as a last resort.

The trial of cause number 73-CR-648, under which I presently stand convicted with a life sentence, began on June 4, 1973. As soon as I got to the Courtroom that morning Norvell Graham approached me and introduced himself. I had never seen him before in my life. He advised me that he had been appointed to assist me. I talked to him a few minutes, asked him some questions, and told him that I wasn't going to accept his assistance. He was very aggressive and indicated to me that he was going to assist me in the trial whether I like it or not. I complained to the Judge that I didn't want Mr. Graham's assistance and asked that Mr. Graham be

dismissed from my case. Judge Woods denied my request and then I requested that he instruct Mr. Graham to not interrupt me as I was trying to defend myself. Judge Woods refused this also, saying that he was not going to instruct the Lawyers out from under their duty. I objected and excepted; and pleaded with the Court that the Lawyers were a part of the Prosecution; and were there for no other reason but to do me harm. I argued this issue before the jury selection began. Also, before jury selection began, Mr. Graham brought me a waiver of the ten days preparation period to sign. I told him that I wouldn't sign anything in connection with his appointment to my case. He said if I didn't the Judge would automatically set the trial off. At that stage It had been 15 and a half Months since my initial arrest. I was sick of the jail and desparate to get out of Bexar County; and I knew that most of the witnesses that I needed was still available for subpoena. I had filed subpoenas for all of them. So I signed the waiver of the ten days. Again, before the jury was selected, I asked Judge Woods to allow me to conduct my defense without Mr. Graham's assistance. I asked that Mr. Graham be removed from my case entirely. Before this request Mr. Graham had already made sarcastic remarks to me. I asked him what right he had to just force himself on me against my will. He said: "Because your a got-damned ex-con, thats why!" Judge Woods again refused to remove Mr. Graham; and again refused to instruct Mr. Graham not to interrupt or initiate any motions on his own. At one point I asked Judge Woods why was I required to have two Lawyers for assistance when I had elected to conduct my own defense; and pointed out that almost all the cases tried of indigents in Bexar County, only one Court Appointed Lawyer was assigned to each case. Here, I was trying to defend myself and two Lawyers are forced on me against my will and over my objections. Judge Woods said he didn't have to explain the Law to me; that he only made rulings. Most of this type of dialogue was omitted from

the record—as I knew it would be. I had to utilize times when witnesses were present to initiate verbal motions and objections so I could be reasonably sure that at least some matter would be kept in the record. A great deal was deleted and testimony by some witnesses actually changed. But enough, I think, was retained, unless further alterations were made after I filed my appeal brief.

After the jury was selected and trial got underway, Mr. Graham took the chair directly behind me. Mr. Samples took the next chair back. Every time I started to cross-examine a prosecuting witness, Mr. Graham would punch me and start whispering in my ear. This was almost constant. I tried the "mind over matter" principle, but was unable to ignore Mr. Graham. Most of what he said was nothing but gibberish. This was such an incongruous experience. Many times throughout the proceedings I complained to Judge Woods about the constant interruptions by Mr. Graham. Finally, Mr. Graham said: "Well, I'll take the third chair," or something to that effect. Then Mr. Samples moved directly behind me and started doing the same thing. At one point, I got so sick of this, I grabbed by chair and scooted it out and away from the table and the Lawyers. Again and again I asked Judge Woods to instruct the Lawyers to leave me alone. He simply would not. I asked him specifically to instruct the Court Appointed Lawyers not to move for mis-trials. Finally, he did this. But Mr. Graham moved for mis-trials anyway, after the Judge instructed him not to. On one occasion I openly objected to Mr. Graham's verbal motion for a mis-trial. This done out of necessity in the presense of the jurors precluded it's omission from the statement of facts.

Judge Woods called a recess about every 20 or 30 minutes. During these periods Mr. Graham would walk around my chair back and forth, cussing me. He would

say: "You aint no Lawyer! You aint nothing but a got-damned ex-convict!" He was very abusive and aggressive. I believed he was attempting to provoke me into some beligerent conduct so that I may be relieved of my right to self defense; or just to keep me upset and confused. I found myself defending more from Mr. Graham than from the accusation itself.

Before the trial I had talked to Mr. Samples. I knew, beyond any doubt, that he was working for the Prosecution. But I knew that I would be required to have him with me during the trial. Mr. Samples wasn't about to do anything for me. But I didn't think he would be able to give me much trouble because he was not that aggressive. But I didn't think that it would appear appropriate to the jurors—especially Mr. Samples being a Negro—for him to just sit there. So, several days before trial, I had asked Mr. Samples if he would take notes during the trial and make a summary to the jury. He said he would. But when the time came for closing arguments Mr. Samples said that Mr. Graham would do this. I did not ask Mr. Graham, at any time, for any purpose, for his assistance. I did, however, acqiescence to his making a summary to the jurors. My thinking at the time was that the jurors had surely perceived that Mr. Graham was working against me; but they heard the evidence; so let them judge Mr. Graham for themselves.

Before arguments began, during examination and objections to the Court's Charge, I had objected to the charge on the principle of "Alibi," since my witnesses were not subpoenaed and I did not present an alibi defense. (I had one alibi witness available, but did not elicit alibi testimony. I omitted this deliberately to prevent rebuttal testimony by the 12 year old girl, Patricia McCray. But the Prosecution called her anyway). My argument to the Court was that it would not be appropriate to charge the jury on the principle of alibi since I did not, in fact, establish an alibi defense. Judge

Woods agreed to delete that portion from his charge. But Mr. Samples argued against me that it should remain in the charge. Judge Woods changed his ruling and went with Mr. Samples. I objected and "excepted." (later, when I got the transcript, I noticed the argument between Mr. Samples and I, over this issue, and the double ruling by Judge Woods, had been deleted.).

When Mr. Graham got up and started his closing arguments to the jury, the first thing he said was something like: "Ladies and Gentlemen, this 60 year old man over here ...," and motioned toward me. Mr. Graham actually mumbled almost throughout his closing statement to the jury. The circumstances were very peculier—and I'm sure the jurors would remember this. The Court Reporter, Valdamar Castano, moved his chair and machine very close to Mr. Graham trying to hear and understand him. (About the age aspect. It had been established that the robber was "about 67 years old." My age on the date in question was 43. The picture they used to get the witness committed to making an identification of me was one made of me when I was 39 years old.). When I got the Transcript about a year later it indicated Mr. Graham made an excellent closing statement. The fact is, I couldn't say for sure what all Mr. Graham had said. Except when he motioned toward me, indicating to the jurors that I was a "60 year old man," I heard and understood very little of what he said. Mr. Graham's manner during his closing statements was very peculier. I am certain the jurors—at least some of them—would remember this. I watched them while Mr. Graham was "talking" and many of them had curious expressions. (The Jury deliberated more than 22 hours).

I made a closing statement, arguing several discrepancies in the case, and particularly requested the jurors to look into the eyes of the Prosecutor who would be argue-

ing that I was guilty; that he, the Prosecutor knew that I was not guilty; and they would be able to perceive of this if they would look into his eyes. After making my closing statement I sat down. Just as I sat down, Mr. Samples began slapping me on the back, saying loudly: "Good Show! Good Show!" This was to break the silence—and pure thinking—that prevailed at the moment. For this brief period the jurors knew that I was not guilty; for they were perceiving the truth in myself in the same way I had asked them to perceive the falsity of the Prosecutor's presentation. The record omitted Mr. Samples slapping me on the back and shouting "Good Show! Good Show!" But it's for certain the jurors would remember this clearly.

I was found guilty by the jury. But only after more than 22 hours of deliberations. They sent back several questions. At one time Mr. Graham ask me if I would "cop" for five years. He said he could get a mis-trial and a plea bargain for five years. I told him that I wouldn't plead guilty for anything; under any circumstances. I got a life sentence. If I had it to do all over again, I would still have a life sentence.

I filed a motion for a new trial. This was denied by "operation of Law" because Judge Woods failed to hold a hearing. But, some 50 days or so after I filed the motion, I was brought into the 37th District Court where Judge Woods was presiding. Mr. Graham and Mr. Samples and the two Prsecutors were present. Samples told me it was a hearing on a writ of habeas corpus that I had filed with the Court of Criminal Appeals. But it wasn't. It was a "mock" hearing on my motion for a new trial. Mr. Graham tried to persuade me to take the witness stand and testify about "your Court Appointed Lawyers." The Courtroom was empty. No witnesses. They had done so much I didn't believe they would stop at falsifying a record of testimony by me if I took the witness stand without there being some objective per-

sons present to hear my testimony. This hearing had no legal value whatever, so I did not testify. Even so, a transcript of this moot hearing was made a part of the record on appeal. The record omitted the arguments that I made to get the Court Reporter, Lois Sulsar of the first trial (72-1141), summoned with her record to show what the testimony of my missing witnesses would have been.

While being kept in the Bexar County jail; and after having told Judge Woods that I did not want any Court Appointed Lawyers on my appeal; and unable to get any record; I asked that some Lawyer be appointed to assist me for the limited purposes of obtaining the record for appeal. It was November, 1973, when another Lawyer, Mr. Brock Huffman, was appointed—and it was the following year before I got any record at all. Much of what I had requested was missing. (I listed the missing matters in my appeal brief.). I attempted to get the rest of the records that I had listed in my "designation of matter for inclusion in the record on appeal" to no avail. Mr. Brock Huffman would do nothing in this regard. The part of the record that was delivered to me was totally overhauled. I received it after the time had expired to file objections to discrepancies in the record. I filed objections anyway and requested a hearing. As was everything else I filed, this pleading also was ignored.

After I filed my appeal brief, Mr. Huffman filed one also. His brief, which raised two of the same issues that I had raised in my brief, was used to circumvent the 21 issues that I had argued in my brief. On March 26, 1975, the Court of Criminal Appeals, through Commissioner Tom Davis, affirmed the conviction, saying simply, that "The Appellant's Pro Se Brief is totally frivolous and without merit." (There is no record at the Court of Criminal Appeals to indicate that "at least

three judges concurred" in the decision by Commissioner Tom Davis, as is required by the Texas Constitution).

In the past I have taken polygraph (Lie Detector) tests when applying for jobs. I know that I am highly vulnerable to those tests. I stand willing to take such a test by an objective Agency to the truthfullness of everything that I have stated in this affidavit. I would challange any or all the Lawyers, whose names I have mentioned herein, to take one also.

Carl Edwin Wiggins

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1135

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

v.

CARL EDWIN WIGGINS,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF IN OPPOSITION

Craig Smyser
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel
for Respondent

OF COUNSEL:

Paul E. Stallings
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2354

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Brief in Opposition	1
Opinions Below	1
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
Reasons for Denying the Writ	6
I. The Fifth Circuit Decision Correctly Applied Faretta	6
II. The Decision Below Turned on the Facts	10
Conclusion	12
Certificate of Service	12

TABLE OF AUTHORITIES

CASE	PAGE
Brown v. Wainwright, 655 F.2d 607 (5th Cir. 1982). . .	9
Faretta v. California, 422 U.S. 806 (1974)	2,6,7,8,10, 11
Wiggins v. Estelle, 520 S.W.2d 780 (Tex.Civ.App. 1975).	1,6
Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982) . . .	1,2,7,8,11
Wiggins v. Estelle, 691 F.2d 213 (5th Cir. 1982) . . .	1

NO. 82-1135

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner

v.

CARL EDWIN WIGGINS,

Respondent

BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Carl Edwin Wiggins, respectfully requests that the Court deny the petition for writ of certiorari.[1]

OPINIONS BELOW

The decision of the Texas Court of Criminal Appeals on direct appeal is Wiggins v. Estelle, 520 S.W.2d 780 (Tex.Civ.App. 1975). The findings and recommendation of the United States Magistrate, adopted by the District Court on August 26, 1980 are reproduced in Petitioner's Appendix C to the Petition for Writ of Certiorari. The panel opinion of the United States Court of Appeals for the Fifth Circuit reversing the denial of habeas corpus relief is Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982) and is reproduced in Petitioner's Appendix B. The Opinion on Denial of Rehearing and Suggestion of Rehearing En Banc is Wiggins v. Estelle, 691 F.2d 213 (5th Cir. 1982) and is reproduced in Petitioner's Appendix A.

---

[1] Craig Smyser, appointed by the Fifth Circuit under the Criminal Justice Act to represent Respondent on appeal, submits this Brief in Opposition. Attached hereto as Appendix A is Respondent's pro se response entitled "Supplemental Brief of Respondent on Jurisdiction."

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. The United States Court of Appeals for the Fifth Circuit denied Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc on November 8, 1982.

QUESTION PRESENTED

DID THE FIFTH CIRCUIT CORRECTLY APPLY THIS COURT'S DECISION IN FARETTA V. CALIFORNIA, 422 U.S. 806 (1974) WHEN IT HELD THAT THE UNWANTED PARTICIPATION OF STANDBY COUNSEL, UNDER THE CIRCUMSTANCES OF THIS CASE, DEPRIVED RESPONDENT OF HIS SIXTH AMENDMENT RIGHT TO CONDUCT HIS OWN DEFENSE?

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

The basic facts of this case are set forth in the panel opinion, Wiggins v. Estelle, 681 F.2d 266 (5th Cir. 1982):

> The circumstances surrounding the crime are easy to relate. In the early evening of January 17, 1972, a man wielding a rusty pistol robbed a Piggly Wiggly store in San Antonio. After having the cashier stuff the day's proceeds into a brown paper bag, the robber fled the store and drove away in his car. Before driving away, however, a second store employee managed to see the thief's license plate number and wrote it down in the palm of his hand. That number was later traced to the appellant, Carl Wiggins.
>
> After a few false starts,[3] Wiggins was indicted and subsequently brought to trial. Before trial commenced, however, appellant requested that he be permitted to conduct his own

---

[3] Footnote omitted.

defense. The court granted that request, but at the same time appointed two attorneys as standby counsel.[4]

The conduct of these attorneys during the course of the trial is the core of appellant's argument that he was denied his Sixth Amendment right of self-representation. While the court made it clear that counsel were present for advisory purposes only,[5] it was not long before one of the attorneys began to take on a more active role. Soon Wiggins began to protest against standby counsel's unsolicited participation, claiming that it prohibited him from

---

4. DEFENDANT: Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript.

MR. SAMPLES: Your Honor, there has -- an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.

THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for counsultation [sic] and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.

Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

....

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behind him.

You may proceed.

Record, vol. I, at 12-14.

5. Id.

conducting his own defense.[6] The court's response was that defendant was going to receive counsel's aid whether he wanted it or not.[7] When defendant later requested that the court at least instruct standby counsel not to take the initiative, the court refused.[8] Thereafter, counsel continuously participated in the proceedings, both in and outside the presence of the jury. In addition to making objections too numerous to cite, counsel on

---

6. MR. GRAHAM: Again, Your Honor, we certainly believe that the arrest of the defendant's son, because of the, because of the --
DEFENDANT: Your Honor, the defendant's son was not arrested.
THE COURT: Wait a minute.
DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir, if you would ask this man to let me defend myself.
MR. GRAHAM: Certainly. Help yourself.
DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.
Id. at 39.

7. THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.
DEFENDANT: Yes sir. I am not a lawyer.
THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.
DEFENDANT: Yes sir.
THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.
DEFENDANT: Yes sir.
THE COURT: You will have every right made available to you under the law, as this Court is able to determine.
DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that.

Id. at 40-41.

8. THE COURT: All right. Mr. Wiggins, what is your pleasure. Mr. Graham here was appointed just two days ago as additional counsel. The law provides that when an attorney is appointed to represent someone, he shall have ten days time in which to prepare. You have had one attorney, though, that has been available to you and has had a month and a half to prepare, but you wish to proceed at this time?
DEFENDANT: Yes, Your Honor, I do.
....
THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

several occasions cursed,[9] argued with defendant,[10] and moved for mistrial against the defendant's wishes.[11] By the time the smoke cleared, Wiggins had been convicted and sentenced to life imprisonment as a recidivist.

---

8. (cont.)

DEFENDANT: Yes, Your Honor.
THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?
DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.
THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.
DEFENDANT: Yes sir, but I would ask the Court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?
THE COURT: Well --
DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.
THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.
DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?
THE COURT: His availability, yes.
DEFENDANT: May I except to that, Your Honor?
THE COURT: It's in the record.

Id. at 65-67.

9. One example of this occurred when Wiggins was examining a witness during voir dire:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?
MR. GRAHAM: God damn it. Wait a minute. I am trying to get ...
(Thereupon, Mr. Graham conferring with defendant.)

Id. at 215. See also Record, vol. II, at 422.

10. The following is representative:

DEFENDANT: Your Honor, I have some questions relative to the in-Court --
MR. GRAHAM: We will take him on cross-examination.
DEFENDANT: I would like to ask him. They are very relevant.
MR. GRAHAM: You can get him on cross-examination. Sit down.

Record, vol. I, at 223.

11.

MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicical as to require a mistrial.
DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel --
THE COURT: I denied the motion for mistrial. Overruled.

> Little time was lost before Wiggins began running the gauntlet of direct appeal,[12] petitions for state writ of habeas corpus,[13] and a petition to the Supreme Court for writ of certiorari. When these routes proved unfruitful, Wiggins undauntedly applied for federal habeas corpus relief.[14] The district court disposed of the petition by adopting the recommendations of the federal magistrate to whom it had been referred. This appeal followed.

The Fifth Circuit panel reversed the decision of the district court and remanded the case for the granting of the writ of habeas corpus. The United States Court of Appeals for the Fifth Circuit denied Petitioner's request for rehearing and rehearing en banc.

REASONS FOR DENYING THE WRIT

I. The Fifth Circuit Decision Correctly Applied Faretta.

The Fifth Circuit held that Respondent's constitutional right to represent himself was violated by the excessive participation of standby counsel. This holding does not extend Faretta. The opinion amounts to nothing more than a restatement of Faretta: the Sixth Amendment provides an accused the right to present his defense without the

---

11. (cont.)
MR. GRAHAM: Jesus Christ.
Record, vol. II, at 422. See also Record, vol. II, at 345-46, 498-99, 512-14 and 539-40.

12. Wiggins v. State, 520 S.W.2d 780 (Tex.Civ.App. 1975).

13. Wiggins filed five petitions for state habeas corpus relief and hundreds of pages of various pleadings in the state courts. His first two applications were filed while his direct appeal was pending. The next two applications were denied by the Texas Court of Criminal Appeals on October 15, 1975, and May 3, 1978. On January 10, 1979, appellant's fifth application was denied; he was also found to have abused the writ.

14. Six separate points of error connected with his trial and conviction were alleged, together with two points of error connected with his appeal from that conviction. See note 1 supra.

undesired interference of a lawyer. As the Court said in Faretta, an unwanted counsel represents an accused only through a "tenuous and unacceptable legal fiction." Id. at 821. Respondent repeatedly asked the court to relieve him of counsel's services, but although the court asked counsel to remain as a standby, counsel participated as if he were in fact conducting the trial. In addition to making many objections, counsel cursed, argued with Respondent, and moved for a mistrial. Wiggins v. Estelle, 681 F.2d at 270. The conduct of counsel in this case constituted unwanted representation, clearly prohibited by Faretta; consequently, this case does not clearly present the question of what latitude a court should allow standby counsel but only presents the question already decided by Faretta: does a defendant have to accept representation by a lawyer.

Petitioner's Petition for Writ of Certiorari mischaracterizes the Fifth Circuit decision as one which "establishes a rule which would totally bind the hands of a trial judge" because "standby counsel would be absolutely prohibited from speaking up in the pro se defendant's behalf, no matter what the circumstances, unless the defendant requested him to do so." Petition for Writ of Certiorari at 9. In support of this position, Petitioner quotes a clause from the Fifth Circuit opinion -- "the rule we establish today is that court-appointed standby counsel is 'to be seen, but not heard.'" Petition for Writ of Certiorari at 8. The court elaborated on that clause, however, in its next sentence: "By this we mean that he [standby counsel] is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." Wiggins v. Estelle, 681 F.2d at 273.

[footnotes omitted.] The court points out in a footnote to this passage that standby counsel may draw the trial court's attention to some legal problem or question in the case, and the trial court, in turn, may request that defendant consult with counsel. Id. at n. 24. The Fifth Circuit's decision does not, therefore, "totally bind the hands of a trial judge confronted with a defendant exercising his Faretta right." Rather, it provides admirably clear guidelines for bench and bar. Moreover, as both Faretta and the Fifth Circuit note, the trial judge may order standby counsel to assume the defense of the case if the accused acts improperly. Faretta at 834, n. 46, Wiggins v. Estelle, 681 F.2d at 271, n. 17, 273, n. 23.

Contrary to Petitioner's assertion, the Fifth Circuit's delineation of the proper role of standby counsel comes straight from Faretta. Faretta held that "a State may -- even over objection by the accused -- appoint a 'standby counsel' to aid the accused if and when the accused requests help." Faretta, at 834, n. 46. [emphasis added]. In this case, the accused specifically requested that counsel not aid him; the Fifth Circuit, following Faretta, held only that when an accused does not request standby counsel's aid, standby counsel should not inject himself into the proceedings.

Petitioner warns that, under the Fifth Circuit's rule, standby counsel may overstep his role even when he calls attention to a violation of the accused's constitutional rights. Petition for Writ of Certiorari, at 10, n. 3. This case does not present that problem. Moreover, there is an easily definable difference between interrupting an accused because counsel believes he can cross-examine a witness more skillfully and pointing out to the court and the accused a potential constitutional violation. The harmless error rule

adopted by the Fifth Circuit recognizes and makes provision for this distinction.

The Fifth Circuit did not hold that interjections by standby counsel create a "presumption of prejudice" as Petitioner contends. Petition for Writ of Certiorari at 11-14. Under the Fifth Circuit's decision, standby counsel is to assist the accused when asked to do so; if standby counsel acts on his own, his conduct will be evaluated according to a harmless error standard. This is not equivalent to a "presumption of prejudice." Instead, when the accused's constitutional right to defend himself is violated by the unsolicited action of standby counsel, the court proceeds to the next step in the analysis to determine whether the violation was harmful. The Fifth Circuit offered guidelines for this analysis -- for instance, strict scrutiny of statements made in the presence of the jury -- but left room for a judicial determination whether, under the circumstances of a particular case, the statements actually prejudiced an accused's presentation of his defense.

The Fifth Circuit rule is commendably simple. Standby counsel knows the advisory nature of his or her role. The trial court understands what to expect and how to instruct standby counsel. The accused may then present his defense.

Petitioner cites no case in any other circuit that conflict with the Fifth Circuit's decision. Although Petitioner contends that the holding in this case is inconsistent with Brown v. Wainwright, 655 F.2d 607 (5th Cir. 1982) (en banc), the Fifth Circuit's denial of rehearing en banc indicates that the Fifth Circuit finds no conflict between the panel opinion in the instant case and its en banc decision in Brown. Furthermore, as Petitioner acknowledges, Brown involved a different issue, the question of

whether an accused, once he asserts the right to self-representation, can waive the right. Clearly, this case does not concern waiver. Throughout his trial, Respondent consistently asserted his desire to conduct his defense without assistance from standby counsel. Unless an accused must declare his wish to represent himself each time he speaks, an absurd suggestion, it is difficult to imagine a more vigorous effort to assert the right of self-representation than occurred here.

II. The Decision Below Turned on the Facts.

The Court should not grant the writ in this case because it presents no unusual or special question of law. Standby counsel conducted himself so outrageously in the trial of this case, that under any circumstances, even if Respondent had accepted this counsel as his court-appointed representative, this Court would not permit this conviction to stand. See Faretta v. California, 422 U.S. 806, 836-37, n. 1 (1974) (Burger, C.J. dissenting). Respondent at trial clearly expressed his dissatisfaction with standby counsel and complained that standby counsel impaired his defense. Standby counsel's repeated interruptions and cursing are instances of overbearing conduct which should not be permitted. Id.

This case does not present the problem, reserved by Faretta, of a defendant complaining that he sacrificed a constitutional argument when he conducted his own defense. Id. at 834, n. 46; Id. at 846, n. 7 (Burger, C.J. dissenting). This is a case where standby counsel, against the wishes of Respondent, adopted trial strategy that significantly and adversely affected Respondent's

constitutional right to present his own defense. Id. at 848 (Blackmun, J. dissenting). It is a case "where distrust, animosity or other personal differences between the accused and his would-be counsel" rendered effective conduct of the defense impossible. Id.

No counsel, standby, court-appointed or privately retained, should be permitted to say to his client, as standby counsel did in this case during voir dire: "God damn it. Wait a minute." Wiggins v. Estelle, 681 F.2d 266 at 270, n. 9. (5th Cir. 1982). No counsel should be permitted to curse or use abusive language during court proceedings as standby counsel did here. Id. Excoriation of such conduct blazes no new constitutional ground; it only admonishes counsel to perform their duties with a minimum of decency and regard for their clients.

As Chief Justice Burger and Justice Blackmun noted in their dissenting opinions in Faretta, this Court has long been an enemy of overbearing conduct on the part of trial counsel. Faretta, 422 U.S. at 836 n. 1; 848 (Burger, C. J. and Blackmun, J. dissenting). Although the conflict here arose between standby counsel and a defendant who asked to represent himself, the Fifth Circuit's decision only represents a continuation of this Court's condemnation of a counsel's unseemly and overbearing conduct. Because the facts of this case so clearly call for the result reached by the Fifth Circuit, this Court should decline to grant Writ of Certiorari.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

VINSON & ELKINS

By: Craig Smyser

Craig Smyser
First City Tower, Suite 3123
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel
for Respondent

OF COUNSEL:

Paul E. Stallings
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2354

CERTIFICATE OF SERVICE

I DO HEREBY certify that a copy of the foregoing Brief in Opposition was served on opposing counsel by mailing a copy of same, certified mail, return receipt requested or hand delivering same, on the 7th day of February, 1983. Notice was further given that the original of same was being filed with the Clerk of the aforementioned Court.

Craig Smyser

Craig Smyser

Office-Supreme Court, U.S.
FILED
FEB 8 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W. J. ESTELLE, JR., Petitioner

v.

CARL EDWIN WIGGINS, Respondent

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Carl Edwin Wiggins, who is now held in a Texas state prison, asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The undersigned counsel was appointed under the Criminal Justice Act by the United States Court of Appeals for the Fifth Circuit to represent Respondent in his appeal to the Fifth Circuit, thus allowing Respondent to invoke the provisions of 18 U.S.C. §3006(A)(d)(6), relieving him of his requirement that he file a signed affidavit supporting this motion.

Nonetheless, Respondent's affidavit in support of this motion is attached hereto.

Respectfully submitted,

Craig Smyser
Counsel for Respondent,
Carl Edwin Wiggins

VINSON & ELKINS
First City Tower, Suite 3123
Houston, Texas 77002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W. J. ESTELLE, JR., Petitioner

v.

CARL EDWIN WIGGINS, Respondent

AFFIDAVIT

BEFORE me, the undersigned authority, on this day personally appeared Craig Smyser, who being by me first duly sworn did depose and say as follows:

I am over twenty-one (21) years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts stated herein.

I, the affiant, am attorney for the Respondent in the above entitled and numbered cause. I am duly licensed to practice law in the courts of the State of Texas, have held that license in good standing for more than two (2) years. I was appointed to represent Respondent under the Criminal Justice Act by the United States Court of Appeals for the Fifth Circuit. As I am not yet eligible to be admitted to the Bar of the United States Supreme Court, Paul Stallings, who is a member of the Bar, has agreed to appear "Of Counsel" on any pleadings that need to be filed in this court until such time as I am able to become a member of the Bar of the United States Supreme Court.

I hereby certify that on this 7th day of February, 1983 three copies of the Response to Petition for Writ of Certiorari, and one copy of the Motion for Leave to Proceed

In Forma Pauperis and Affidavit in Support of Motion for Leave to Proceed In Forma Pauperis were mailed by certified mail, return receipt requested, postage prepaid, to each of the following persons: Gilbert J. Pena and Leslie A. Benitez, Assistant Attorneys General, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for Petitioner. I further certify that all parties required to be served here have been served.

Craig Smyser

Craig Smyser

STATE OF TEXAS §
§
COUNTY OF HARRIS §

SUBSCRIBED and sworn to before me, a Notary Public, this 7th day of February, 1983.

Rhonda J. Goodson

(SEAL)

Notary Public in and for Harris County, T E X A S

RHONDA J. GOODSON
My Commission Expi

My Commission Expires:
9-5-84

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
* * * * * * * * * * * * * * * * *

NO. 82-1135

W.J. ESTELLE, JR.,

Petitioner

VS

CARL EDWIN WIGGINS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 45 of the Rules of this Court, Motion is hereby made that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Leave to proceed in forma pauperis has been sought in the Court below and granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of the Attorney General of Texas, at P.O. Box 12548, Austin, Texas 78711, on this the 25th day of JANUARY, 1983.

RESPECTFULLY SUBMITTED

Carl Edwin Wiggins

Carl Edwin Wiggins, Respondent
P.O. Box 32 - 241697
Huntsville, Texas 77340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W.J. ESTELLE, JR.,
Petitioner

VS

CARL EDWIN WIGGINS ,
Respondent

A F F I D A V I T

I, Carl Edwin Wiggins, being first duly sworn according to law, depose and say, in support of my Motion For Leave to proceed without being required to prepay costs of the fees:

(1). I am the Respondent in the above entitled case.

(2). I am presently incarcerated in the Texas Department of Corrections and have no means of obtaining money to pay the costs or fees involved in this case that has been initiated in this Court by the Petitioner.

(3). I have no savings and because of my poverty I am unable to pay the costs of this cause.

(4). I am unable to give security for the same.

(5). I believe I am entitled to the redress I seek.

(6). I was forcefully and fraudulently convicted of a crime that I did not commit.

(7). The nature of this case is briefly stated as follows:

I was arrested at my home in Corpus Christi, Texas on February 20, 1972, and charged with the alleged offense of robbery that allegedly occured in San Antonio, Texas, on January 17, 1972. Subsequently, after being held in the Bexar County Jail for 3 months, the charge was dismissed and I was released. I then set out to file suit against certain parties involved in my arrest and imprisonment, because of the tremendous amount of damages caused my family; my wife who was seven months

pregnant and had to be hospitalized; and the fact that I was not guilty of any offense whatsoever. Consequently I was rearrested and placed in jail again and again charged with the same offense. From that point I was kept in jail for more than two (2) years, despite my pleas for a speedy trial, and was indicted and reindicted a total of four (4) times on the same charge. On March 23, 1973, the charge was again dismissed and I was ordered released. I was not released, however, but was placed back in jail and the following week I was presented with two (2) more indictments charging the same alleged offense. During the course of these prosecutions several court appointed lawyers were forced on me, against my will, who openly acted to undermine my efforts to defend from the accusation. I learned as early as November, 1972, that the lawyers were deliberately working to assist the prosecution under pretense of "defense counsel." I testified at two pre-trial hearings about the conduct of these lawyers, December 7, 1972 and January 11, 1973, and asserted my right to defend myself without any lawyers. The trial judge ruled that I was going to have the lawyers whether I liked it or not. I was convicted only because I was deprived of defense witnesses; the State failed to process my subpoena applications; and because the lawyers, under pretense of "defense counsel," actively assisted the prosecution and interfered with my efforts to defend myself. One of the two lawyers forced on me entered my case for the first time on the same day trial started. It was this lawyer who interfered so much during trial. I had never seen him in my life until the day trial started.

After conviction I gave notice of appeal and pleaded that no lawyer represent me on appeal; that I be allowed to prosecute my own appeal. About a year later, after much difficulty trying to obtain a record, I filed my appeal brief. A month after I filed my own appeal brief, a court appointed lawyer

filed a brief "On behalf of the Appellant." The Court of Criminal Appeals, within ninety days of filing the briefs, treated the court appointed lawyers' brief as representation of my appeal; ignored the grounds raised in my brief; and affirmed the judgment. This procedure completely nullified my appeal to the Texas Court of Criminal Appeals.

Finally, without any lawyers, I returned to the State courts with applications for writ of habeas corpus, reurging the grounds, and all such applications were denied without hearing and without written opinions. In July, 1975, I filed a petition for writ of habeas corpus pursuant to Title 28 USC 2254, etc., in the United States District Court for the Western District of Texas, San Antonio Division, raising, among other grounds, the forced court appointed lawyer issue, and in 1977, Judge D.W. Suttle of that court issued an order of recusal which resulted in my case being transferred to Judge John Wood. Judge Wood dismissed that petition "for failure to exhaust state remedies" in August, 1977. I returned to the state courts with additional applications for writ of habeas corpus, urging again the same issues, and was cited for "abuse" of the writ. A Petition For Writ of Certiorari was requested from this Court and denied as Number 78-5151 in November, 1978. Then I filed a second petition for writ of habeas corpus pursuant to Title 28 USC 2254 in the United States District Court for the Southern District of Texas, Houston Division, and that petition was transferred, with suggestion for hearing, to the Western District in San Antonio, Texas and docketed there as No. SA-79-CA-128. The Petition was denied without a hearing and appeal was taken to the United States Court of Appeals for the Fifth Circuit; docketed as No. 80-2278. On July 26, 1982, a three Judge Panel reversed the judgment and the Respondent filed for this Court's review in a petition for writ of certiorari to which I now must respond.

Carl Edwin Wiggins

Carl Edwin Wiggins, Affiant

STATE OF TEXAS)
)
COUNTY OF WALKER)

The foregoing duly witnessed and sworn to before me, a NOTARY PUBLIC, on this 25th day of January, 1983.

ORIGINAL NOTARIZED
NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS

RECEIVED
JAN 27 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982
. . . . . .

NO. 82-1135

W.J. ESTELLE, JR.,

Petitioner

VS

CARL EDWIN WIGGINS

Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 45 of the Rules of this Court, Motion is hereby made that the Respondent be allowed to proceed in forma pauperis before this Court for the reasons stated in the attached affidavit. Leave to proceed in forma pauperis has been sought in the Court below and granted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion was mailed to the Office of the Attorney General of Texas, at P.O. Box 12548, Austin, Texas 78711, on this the 25th day of January, 1983.

RESPECTFULLY SUBMITTED

Carl Edwin Wiggins

Carl Edwin Wiggins, Respondent
P.O. Box 32 - 241697
Huntsville, Texas 77340

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

NO. 82-1135

W.J. ESTELLE, JR.,
Petitioner

VS

CARL EDWIN WIGGINS ,
Respondent

A F F I D A V I T

I, Carl Edwin Wiggins, being first duly sworn according to law, depose and say, in support of my Motion For Leave to proceed without being required to prepay costs of the fees:

(1). I am the Respondent in the above entitled case.

(2). I am presently incarcerated in the Texas Department of Corrections and have no means of obtaining money to pay the costs or fees involved in this case that has been initiated in this Court by the Petitioner.

(3). I have no savings and because of my poverty I am unable to pay the costs of this cause.

(4). I am unable to give security for the same.

(5). I believe I am entitled to the redress I seek.

(6). I was forcefully and fraudulently convicted of a crime that I did not commit.

(7). The nature of this case is briefly stated as follows:

I was arrested at my home in Corpus Christi, Texas on February 20, 1972, and charged with the alleged offense of robbery that allegedly occured in San Antonio, Texas, on January 17, 1972. Subsequently, after being held in the Bexar County Jail for 3 months, the charge was dismissed and I was released. I then set out to file suit against certain parties involved in my arrest and imprisonment, because of the tremendous amount of damages caused my family; my wife who was seven months

pregnant and had to be hospitalized; and the fact that I was not guilty of any offense whatsoever. Consequently I was rearrested and placed in jail again and again charged with the same offense. From that point I was kept in jail for more than two (2) years, despite my pleas for a speedy trial, and was indicted and reindicted a total of four (4) times on the same charge. On March 23, 1973, the charge was again dismissed and I was ordered released. I was not released, however, but was placed back in jail and the following week I was presented with two (2) more indictments charging the same alleged offense. During the course of these prosecutions several court appointed lawyers were forced on me, against my will, who openly acted to undermine my efforts to defend from the accusation. I learned as early as November, 1972, that the lawyers were deliberately working to assist the prosecution under pretense of "defense counsel." I testified at two pre-trial hearings about the conduct of these lawyers, December 7, 1972 and January 11, 1973, and asserted my right to defend myself without any lawyers. The trial judge ruled that I was going to have the lawyers whether I liked it or not. I was convicted only because I was deprived of defense witnesses; the State failed to process my subpoena applications; and because the lawyers, under pretense of "defense counsel," actively assisted the prosecution and interfered with my efforts to defend myself. One of the two lawyers forced on me entered my case for the first time on the same day trial started. It was this lawyer who interfered so much during trial. I had never seen him in my life until the day trial started.

After conviction I gave notice of appeal and pleaded that no lawyer represent me on appeal; that I be allowed to prosecute my own appeal. About a year later, after much difficulty trying to obtain a record, I filed my appeal brief. A month after I filed my own appeal brief, a court appointed lawyer

filed a brief "On behalf of the Appellant." The Court of Criminal Appeals, within ninety days of filing the briefs, treated the court appointed lawyers' brief as representation of my appeal; ignored the grounds raised in my brief; and affirmed the judgment. This procedure completely nullified my appeal to the Texas Court of Criminal Appeals.

Finally, without any lawyers, I returned to the State courts with applications for writ of habeas corpus, reurging the grounds, and all such applications were denied without hearing and without written opinions. In July, 1975, I filed a petition for writ of habeas corpus pursuant to Title 28 USC 2254, etc., in the United States District Court for the Western District of Texas, San Antonio Division, raising, among other grounds, the forced court appointed lawyer issue, and in 1977, Judge D.W. Suttle of that court issued an order of recusal which resulted in my case being transferred to Judge John Wood. Judge Wood dismissed that petition "for failure to exhaust state remedies" in August, 1977. I returned to the state courts with additional applications for writ of habeas corpus, urging again the same issues, and was cited for "abuse" of the writ. A Petition For Writ of Certiorari was requested from this Court and denied as Number 78-5151 in November, 1978. Then I filed a second petition for writ of habeas corpus pursuant to Title 28 USC 2254 in the United States District Court for the Southern District of Texas, Houston Division, and that petition was transferred, with suggestion for hearing, to the Western District in San Antonio, Texas and docketed there as No. SA-79-CA-128. The Petition was denied without a hearing and appeal was taken to the United States Court of Appeals for the Fifth Circuit; docketed as No. 80-2278. On July 26, 1982, a three Judge Panel reversed the judgment and the Respondent filed for this Court's review in a petition for writ of certiorari to which I now must respond.

Carl Edwin Wiggins

Carl Edwin Wiggins, Affiant

STATE OF TEXAS)
)
COUNTY OF WALKER)

The foregoing duly witnessed and sworn to before me, a NOTARY PUBLIC, on this 25th day of January, 1983.

Michael W. Flanagin
NOTARY PUBLIC IN AND FOR
WALKER COUNTY, TEXAS

MICHAEL W. FLANAGIN
NOTARY PUBLIC
WALKER CO. TEXAS
COMMISSION EXP. DATE 12/4/84

RECEIVED
JAN 27 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

* * * * * * * * * * * * * * * * * *

NO. 82-1135

W.J. ESTELLE, JR.,
Petitioner

VS

CARL EDWIN WIGGINS,
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT ON JURISDICTION

CARL EDWIN WIGGINS, Pro Se
P.O. Box 32 - 241697
Huntsville, Texas 77340

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES.....	ii
PREFACE.....	1-3
REASONS FOR DENYING THE WRIT.....	4-6
CONCLUSION.....	7
CERTIFICATE OF SERVICE.....	8

TABLE OF AUTHORITIES

	PAGE
Fay v. Noia, 372 U.S. 391 (1963)	4
Rice v. Sioux City Memorial Parks Cementary, 349 U.S. 70 (1955).....	4
Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975).....	4,6
United States v. Price, 474 F 2d 1223, 1227, (9th Circuit 1973).....	4

PREFACE

The Petitioner, W.J. Estelle, Director of the Texas Department of Corrections, was the Appellee in the United States Court of Appeals for the Fifth Circuit. The Respondent, Carl Edwin Wiggins, was the Appellant in the Fifth Circuit Court of Appeals. In this brief, the parties will be referred to as they appear before this Court.

The symbol "App" will be used to designate portions of the Appendix filed with the petition. Pursuant to U.S. Supreme Court Rule 34 (2) the Respondent will show the Court the following inaccuracies or omissions in the statement by the Petitioner:

In "Statement of the Case," 2nd paragraph, page 3 of the petition, the following is stated:

> "Several months later, however, he requested the appointment of counsel. Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty page appellate brief."

The Petitioner fails to correctly place the pertinent facts in proper perspective: Respondent's request for assistance was made only for the limited purpose of obtaining the record for appeal. Subsequently, that Court appointed lawyer filed an appeal brief, on his own inititive AFTER the Respondent filed his one hundred fifty page brief. This action effectively nullified the Respondent's appeal brief.

In "Statement of the Facts," 1st paragraph, page 4 of the petition, the following is stated:

> "On April 16, 1973, Respondent filed a request for appointed counsel prior to his second trial, specifically stating that he wished to rescind his earlier waiver of counsel." And further on in the same paragraph: "On May 26, 1973, however, he filed an additional request for counsel."

The records clearly reflect that the April 16, 1973, request for assistance of counsel was for a specifically named attorney, Mr. Stewart Alexander, who had earlier indicated concern about the injustice surrounding the Respondent's prosecutions in Bexar County, Texas. After Mr. Alexander had voluntarily came to the jail and talked to the Respondent, the request for assistance, the petitioner refers to, was made. Consequently, Mr. Alexander was not appointed, but other counsel named Benjamin Sample was. The May 26th request was, as is reflected in the record, for some counsel to prepare a memorandum of law on the multiple (4) indictment, prosecution, procedure the state was utilizing against the Respondent in Bexar County, Texas. This second attorney, Norvell Graham, entered the case for the first time on the same day trial started and forcefully interferred with the Respondent's efforts to conduct his defense. At no time did Mr. Graham even mention a memorandum of law, or the illegal circumstances on which the Respondent based his request for the "assistance of counsel" the Petitioner refers to.

In "Statement of Facts,"pages 5 and 6, of the petition, it is alleged: "Respondent specifically approved of counsel's actions.. accepted the assistance and aid of his standby counsel... and specifically adopted counsel's objections." The Petitioner's allegations are untrue. The records do not reflect any such approvals, acceptance or adoptions of counsel's actions during Respondent's trial. Had the Respondent been afforded an evidentiary hearing in the District Court below; and the Respondent did file pleadings for a hearing early in the proceedings; these matters, as well as other important questions, could have been cleared up and facts established for the record. Unfortunately, the District Court below failed to order a hearing.

The Petitioner has included in the Appendix the Magistrate's

"Report and Recommendation" to the District Court below, which initially, and erroneously, disputes Respondent's claims of interference by the forced counsels. Please see "App" C-4. But that same Magistrate, in his subsequent report, corrected himself. The Petitioner failed to point this out for the Court. The following is verbatim from the Magistrate's corrected finding and appears on pages 000291, 292 in the "Record On Appeal" in the Fifth Circuit.

> "As Petitioner here was tried in June of 1973, he clearly had the right to defend himself without interference from either the court or court appointed counsel."
>
> "In the case at bar, Petitioner clearly and unequivocally made known his desire to defend himself, without the assistance of counsel. Nevertheless, the trial judge refused to dismiss his court appointed attorneys, and instead allowed counsel to remain at the counsel table and to participate in the proceeding against petitioner."

(Quoted directly from the record).

The above inaccuracies and omissions create a first impression that is extremely misleading from the facts; erroneously makes it appear the Respondent was vacilating on the question of self-defense and attempts to define interference as "assistance."

REASONS FOR DENYING THE WRIT

The Petitioner seeks to invoke the Certiorari jurisdiction of this Court pursuant to Title 28, U.S.C., 1254(1). A review on Writ of Certiorari, however, is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. U.S. Supt. Ct. Rule 17; Fay v. Noia, 372 U.S. 391 (1963). The "special and important reasons" contemplated by the Rule relate to problems beyond the academic or episodic and those which reach constitutional dimensions. Certiorari should not be granted except in cases involving principles, the settlement of which, is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Courts. Rice v. Sioux City Memorial Parks Cemetary, 349 U.S. 70 (1955).

This case satisfies none of the criteria established for invoking this Court's jurisdiction. Only a minuscule number of citizen-defendants can be effected by it. It creates absolutely no conflict of precedent and is, in fact, entirely consistent and expressly in accord with the principles set forth in this Court's Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.2d. 2d 562 (1975). In more ways that one this Court has indicated that under no circumstances may a state force a lawyer upon an unwilling defendant:

> "No State or Colony has ever forced counsel upon an accused; no spokesman has ever suggested that such a practice would be tolerated, much less advisable." (Faretta, supra at page 26, sl.op.).

In United States v. Price, 474 F.2d 1223, 1227, (9th Cir. 1973), it was held that a trial court may appoint counsel to be present and prepared to give advice in a case where the defendant has elected to defend himself, but that such counsel "may not interfer with the defendant's presentation of the case and may give advice only upon request."

In the case at bar the defendant clearly and unequivocally elected to defend himself in his trial, without counsel. "Nevertheless, the trial judge refused to dismiss his court appointed attorneys, and instead allowed counsel to remain at the counsel table and to participate in the proceeding against the petitioner" (Defendant). As noted by the unanimous opinion by the Fifth Circuit:

> "In addition to making objections too numerous to cite, counsel on several occasions cursed, argued with the defendant, and moved for mistrial against the defendant's wishes." Please see "App" B-6 & 7.

The appeals court held that in cases in which a defendant has been granted the right to proceed pro se but standby counsel has been appointed, interference with defendant's right of self-representation by court-appointed standby counsel may be harmless error, but that the burden of showing harmless error, under such circumstances is a heavy one and rests on government. The Court found, upon examination of the record as a whole, it was not harmless error where "counsel continuously objected, and on several occasions moved for mistrial, despite defendant's repeated requests that he play a more passive role; defendant and standby counsel were in constant disagreement over basic strategy, and at one point counsel cursed in front of jury." Please see first paragraph of "App" B-18.

The Petitioner apparantly takes the position that <u>any amount</u> of interference by a standby counsel, construed by petitioner as "assistance," would not impair one's constitutional right to defend himself, without counsel, in an adversary trial, indicating such unwanted activity by forced counsel does not deny the defendant a "genuine opportunity" to defend himself. In f.n. 4, page 21, of Appellee's brief to the Fifth Circuit, the following is stated:

> "Petitioner makes some general allegations that the transcription of the court reporter's notes were altered, to delete portions of the record which would show that counsel participated in the trial to a greater extent that the record reflects. This allegation, even if credible, fails to state a claim for relief, since even if true, this allegation is insufficient to show that Petitioner was deprived of the right and opportunity to defend himself."

(Unquote). The implication of the Petitioner's theory of a "genuine opportunity" is that no matter what, or how much, the court appointed attorney participates (interfers) in a trial involving a "Pro Se" defense, the defendant nevertheless enjoyed his right to defend himself without counsel. Its a ridiculous conception of the meaning of such a fundamental right as the right for one to defend himself from an accusation is. No where in Faretta, supra, or any other opinion on the issue of self-defense, is it suggested a defendant is entitled to only what may be construed differently in different jurisdictions a "genuine opportunity" to conduct a pro se defense. The Supreme Court's adoption of a "genuine opportunity" rule, requested by the Petitioner, would obviously create a great deal of confusion within the judiciary.

The essence of Faretta was succinctly stated:"

> "The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

Faretta v. California, 422 U.S. 820-21, 95 S.Ct. 2533-34.

The decision of the unanimous panel of the United States Court of Appeals for the Fifth Circuit, is eminently correct and certiorari should be denied.

CONCLUSION

This case involves no important question of Federal law. The decision of the United States Court of Appeals creates no conflict of precedent whatsoever. It is, in fact consistent with this Court's decisions cited in the opinion by the Court of Appeals. There are no important reasons to disturb the decision by the Court of Appeals. This Court's writ of certiorari should not issue.

RESPECTFULLY SUBMITTED

Carl Edwin Wiggins

Carl Edwin Wiggins, Pro Se
P.O. Box 32 - 241697
Huntsville, Texas 77340

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing response to the Petition for writ of certiorari has been served by mailing same, postage prepaid, to Ms. Leslie Benitez, Assistant Attorney General, State of Texas, P.O. Box 12548, Austin, Texas 78711, and also a copy of same addressed to: Mr. Craig Smyser, Attorney at Law, 3100 first City Tower, Houston, Texas 77002, on this the 29th day of January, 1983, and that all parties required to be served have been served.

Carl Edwin Wiggins

Carl Edwin Wiggins,
Box 32 - 241697
Huntsville, TX 77340

SUPPLEMENTAL FACTUAL BACKGROUND

Pursuant to the Criminal Justice Act the United States Court of Appeals for the Fifth Circuit appointed Mr. Craig Smyser in May 1981 to represent Mr. Wiggins on appeal from the denial of Mr. Wiggins' petition for writ of habeas corpus by the United States District Court for the Western District of Texas. Promptly thereafter, Mr. Wiggins filed a Petition for Writ of Mandamus and/or Prohibition in the United States Supreme Court requesting that Judge Thomas Gibbs Gee's appointment of Mr. Smyser be vacated. The United States Supreme Court declined to vacate the appointment.

By letter of June 3, 1981, Mr. Wiggins requested that Mr. Smyser file a brief in the United States Supreme Court in support of Mr. Wiggins' petition to have Mr. Smyser removed as his counsel; Mr. Smyser said he would file such a brief if it was permitted. On June 23, 1981, after a conversation with Mr. Frank Lorson, Mr. Smyser determined that the United States Supreme Court would not accept a brief in connection with Mr. Wiggins' Petition and so informed Mr. Wiggins. On October 5, 1981, the United States Supreme Court denied Mr. Wiggins' Petition for a Writ of Mandamus and/or Prohibition.

Mr. Wiggins also applied to the United States Court of Appeals for the Fifth Circuit to appear before that Court in oral argument. On May 26, 1981, the Fifth Circuit overruled that request. Mr. Smyser subsequently prepared a brief which he filed in the United States Court of Appeals for the Fifth Circuit on February 2, 1982.

The Fifth Circuit scheduled oral argument for April 22, 1982. Mr. Wiggins requested that Mr. Smyser read a statement authored by Mr. Wiggins during oral argument before the Fifth Circuit. Mr. Smyser concluded his oral argument before the Fifth Circuit with this statement, and this statement appeared as a footnote in the Fifth Circuit opinion Wiggins v. Estelle, 681 F.2d 275, n.29 (5th Cir. 1982).

On July 26, 1982, the Fifth Circuit reversed the district court's denial of the writ of habeas corpus. Wiggins v. Estelle, 681 F.2d 216 (5th Cir. 1982). On November 8, 1982, the Fifth Circuit denied Estelle's petition for rehearing and suggestion for rehearing en banc. Wiggins v. Estelle, 691 F.2d 213 (5th Cir. 1982). On February 22, 1983, this Court granted writ of certiorari.

Although Mr. Smyser is not yet a member of the Bar of the United States Supreme Court, he will be eligible and will move to become a member in November 1983. He is a civil trial lawyer with Vinson & Elkins in Houston and has tried more than a dozen cases. In addition to his appellate work on this case, he has appealed three state court matters, one to the Supreme Court of Texas, and has submitted written briefs to Administrative Law Judges in several cases tried under the Longshore and Harbor Workers' Compensation Act. He is co-editor and author of the Texas Association of Defense Counsel's Medical Malpractice Newsletter.

Mr. Smyser graduated from the University of Texas Law School, where he was a member of the Texas Law Review and author of "Protecting the Public Debate: A Proposed Constitutional Privilege of Accurate Re-publication" appearing in 58 Texas L. Rev. 623 (1980). He was chairman of the Moot Court Board at the Law School, member of the National Moot Court Team, winner of several briefing awards in intramural moot court competition, and winner of the International Academy of Trial Lawyers Award as the outstanding advocate in his law school class. In addition, he received the highest grade in his law school Constitutional Law Seminar.

Before attending law school, he was a reporter on the Houston Chronicle for four years. He graduated cum laude from the University of Texas and is a member of Phi Beta Kappa. Since the Fifth Circuit appointed him, he has endeavored to represent Mr. Wiggins according to the highest standards of the law. To date, he has spent more than 230 hours working on this case.

VINSON & ELKINS
ATTORNEYS AT LAW
FIRST CITY TOWER
HOUSTON, TEXAS 77002
TELEPHONE 713 651-2222 TWX 910881-6330 TELEX 762 148

1101 CONNECTICUT AVE. N. W. SUITE 900
WASHINGTON, D. C. 20036
TELEPHONE 202 862-8500
CABLE VINELAWS TELEX 89650

47 CHARLES ST. BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 44 01 491-7235
CABLE VINELAWS LONDON W 1 TELEX 24440

ONE ALLEN CENTER, 3500 ALLEN CENTER
DALLAS, TEXAS 75201
TELEPHONE 214 651-2500

RECEIVED
MAR 3 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

March 2, 1983

Mr. Frank Lorson
Office of the Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: No. 82-1135; W. J. Estelle, Jr. vs.
Carl Edwin Wiggins

Dear Mr. Lorson:

Pursuant to your request in our telephone conversation of March 2, 1983, I write to inform you that I stand ready to serve the United States Supreme Court in any capacity the Court deems appropriate in connection with the case referenced above.

As you know, Respondent Carl Edwin Wiggins has filed a Motion for Appointment of Counsel in which he requests that the Court appoint any lawyer outside the State of Texas to represent him. Under these circumstances, I do not think it appropriate for me to file a motion requesting that I be appointed as counsel for Mr. Wiggins. Nonetheless, as I indicated, while I am not seeking the appointment in view of Mr. Wiggins' feelings on this matter, I am an officer of the Court, and I will discharge to the best of my ability any duties the Court may request me to perform. Moreover, I consider it an honor to serve the Court in any capacity. Also, as you requested, I attach a brief statement concerning the history of this case and my personal background.

I will be glad to assist in any way in the development and the presentation of this case to the Court, whether it be as Mr. Wiggins' appointed counsel or as an aid to any other court-appointed attorney who needs to master the

record in this case. If I can be of any other assistance or if you have any questions, please call me at (713) 651-2730.

Very truly yours,

VINSON & ELKINS

By: Craig Smyser
Craig Smyser

498:2225
Attachment
cc: Mr. Carl Wiggins
Box 32 - 241697
Huntsville, Texas 77340

Ms. Leslie Benitez
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711

RECEIVED
MAR 3 1983

Mr. Craig Smyser,
Attorney At Law
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002

February 28, 1983

Re: Motion For Appointment of Counsel - Cert. 82-1135

Dear Mr. Smyser:

This is a followup letter from the mailing of the motion for appointment of counsel.

Today I received from the mailroom the papers (your motion for appointment of counsel, which I refused to sign on Saturday upon delivery by the Courier) and your letter of explanation. Prior to this I had already prepared my own motion for appointment of counsel, requesting specifically any counsel outside of Texas to represent me in the U.S. Supreme Court. Even though I cannot criticize anything you did; and the great amount of gratitude I feel; I could never feel at ease with <u>any</u> lawyer in the State of Texas representing me. I accepted your representation because the Supreme Court denied my petition for writ of mandamus/prohibition. If you, or any other Attorney in Texas, is appointed by the court to represent me in this certiorari proceeding, then I will accept such representation and cooperate to the best of my ability. But my preference is, as indicated in my motion, counsel outside of the State of Texas. The background of this conviction represents justification for my reasons.

I want to assure you that I struggled with the decision; I prayed about it more than once. Your personal feelings; how you may be personally effected; was no small matter for me. But all things considered, I had to follow the dictates of my own reasoning. Please forgive me if I offended you.

Sincerely yours,

Carl Edwin Wiggins,
Box 32 - 241697
Huntsville, TX 77340

RECEIVED
MAR 9 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

VINSON & ELKINS
ATTORNEYS AT LAW
FIRST CITY TOWER
HOUSTON, TEXAS 77002
TELEPHONE 713 651-2222 TWX 910881-6381 TELEX 762 148

1101 CONNECTICUT AVE. N.W. SUITE 900
WASHINGTON, D.C. 20036
TELEPHONE 202 862-8500
CABLE VINELAINS TELEX 89680

47 CHARLES ST., BERKELEY SQUARE
LONDON W1X 7PB, ENGLAND
TELEPHONE 44 01 491-7236
CABLE VINELAINS LONDON W 1 TELEX 24140

AUSTIN NATIONAL BANK TOWER
AUSTIN, TEXAS 78701
TELEPHONE 512 478-9500

March 8, 1983

Miss June Hoffman
Office of the Clerk
United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: No. 82-1135; W. J. Estelle, Jr. vs.
Carl Edwin Wiggins

Dear Miss Hoffman:

Pursuant to the specific telephone request of Mr. Frank Lorson, I enclose a copy of a letter Mr. Carl E. Wiggins wrote me subsequent to his filing his Motion for Appointment of Counsel.

As you probably know from Mr. Lorson, although Mr. Wiggins has written me on numerous occasions to express his satisfaction with my representation of him, I have been reluctant to send any of this correspondence to the Court. Thus, while I send on Mr. Wiggins' most recent letter, I still feel it would be improper to forward any of our earlier correspondence. To the extent, however, that the letter requested by Mr. Lorson may assist the Court in evaluating the motions presently before it, I accede to his request. I repeat that I would be honored to represent Mr. Wiggins before the Court or to serve the Court in any other capacity it desires.

As always, I appreciate the attention you and Mr. Lorson have given this matter. If I can be of any further service, please call me at (713) 651-2730.

Very truly yours,

VINSON & ELKINS

By: Craig Smyser
Craig Smyser

498:2225
Enclosure

RECEIVED
MAR 3 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

OFFICE OF THE CLERK,
Supreme Court of The United States
Washington, D.C. 20543

February 28, 1983

Re: Estelle v. Wiggins, Certiorari No. 82-1135, granted 2-22-83 - Respondent's Motion For Appointment of Counsel

Dear Sir:

Herewith is my motion for appointment of counsel in the Cause styled and numbered above.

Will you please file this and bring to the attention of the court at your earliest convenience.

Thank you for your kind assistance.

Respectfully yours,

Carl E. Wiggins

Carl Edwin Wiggins,
Box 32 - 241697
Huntsville, TX 77340

cc: Attorney Ceneral's Office
P.O. Box 12548
Austin, TX 78711

Mr. Craig Smyser,
Attorney At Law
3100 First City Tower
Houston, TX 77002

RECEIVED
MAR 3 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

NO. 82-1135

W.J. ESTELLE, JR.,
Petitioner
VS
CARL EDWIN WIGGINS,
Respondent

RESPONDENT'S MOTION FOR APPOINTMENT OF COUNSEL

TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT:

RESPONDENT, Carl Edwin Wiggins, in the above styled and numbered Cause, requests appointment of counsel to represent him in this court pursuant to Supreme Court Rule 46, .6 and .7; and the Criminal Justice Act of 1964, as amended (18 U.S.C. 3006A). Respondent would show the following:

I

This court granted the petition for writ of certiorari in this Cause on the 22nd day of February, 1983.

II

The Respondent is an indigent prisoner of the Texas Department of Corrections and has been allowed to proceed in FORMA PAUPERIS in the courts below.

III

The Respondent is not represented in this Cause by counsel who has been admitted to practice in this court.

IV

Present counsel was appointed by the Court of Appeals For the Fifth Circuit, and represented Respondent in that court only

after this court denied Respondent's "Petition For Writ of Mandamus, or Prohibition," which sought to dispense with counsel in the appeal. (Please see In Re: Carl Edwin Wiggins, S.Ct. No. 80-6700, denied Oct. 5, 1981). During the proceeding in the Court of Appeals, the Respondent's Court appointed counsel made the following pertinent statement in a letter to the Respondent on November 11, 1982:

> "Needless to say, if the Supreme Court granted the writ of certiorari, I think it would be very bad for our chances. The Supreme Court as it is constructed has handed down a number of opinions restricting the rights of defendants and favoring the conduct of the State and the prosecution. Therefore, I think the initial disposition of the Court would be in favor of the State of Texas' position and against ours."

(Unquote).

Respondent's present counsel has acknowledged that he is not qualified to practice in the Supreme Court of the United States. Consequently, he has selected a member of the firm for which he works, who is qualified, to represent the Respondent. This amounts to an attorney, whose appointment was opposed by the Respondent at the outset;[1/] and who has not yet gained his admission to the Supreme Court Bar; and who has indicated a generally negative attitude toward this court's review of this case; deciding, by the measure of his mind, the appointment of counsel who would represent the Respondent in this court. The Respondent submits he is entitled to have such an important appointment made by the Justices of the Supreme Court. Accordingly, the Respondent respectfully requests this Honorable Court to appoint coursel to represent him in this Cause.

V

The Respondent acknowledges that he does not have the right to a particular counsel of his choice, but would

---

1/ This is not to say the Respondent is unappreciative for the good work counsel subsequently did in the Court of Appeals.

respectfully request , and humbly pleads, the appointment of any qualified Attorney outside the State of Texas.

VI

PREMISES CONSIDERED, Respondent Carl Edwin Wiggins, Prays this Honorable Court will appoint Counsel to represent him in this Court in Cause number 82-1135.

RESPECTFULLY SUBMITTED,

Carl E. Wiggins

Carl Edwin Wiggins,
P.O. Box 32 - 241697
Huntsville, TX 77340

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true and correct copy of the foregoing motion for appointment of counsel was mailed, postage prepaid, to the Office of the Attorney General for Texas, at P.O. Box 12548, Austin, Texas, 78711; and to Respondent's Counsel of record; on this the 28th day of FEBRUARY, 1983; and that all parties required to be served have been served on this date.

Carl E. Wiggins

Carl Edwin Wiggins,
P.O. Box 32 - 241697
Huntsville, TX 77340

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office-Supreme Court, U.S.
FILED
MAY 2 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1135

IN THE UNITED STATES SUPREME COURT OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR PETITIONER

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant Attorney General

NANCY M. SIMONSON
Assistant Attorney General
Acting Chief, Enforcement Division

LESLIE A. BENITEZ*
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas, 78711
(512) 475-3281

**Attorney of Record*

QUESTIONS PRESENTED

I. WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF REPRESENTATION, DOES THE LIMITED PARTICIPATION OF STANDBY COUNSEL ABROGATE HIS EXERCISE OF THE RIGHT, ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF?

II. HAS THE FIFTH CIRCUIT EXTENDED *FARETTA V. CALIFORNIA* BY PRESUMING PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PROSE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORUNITY TO REPRESENT HIMSELF?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 7

REASONS FOR GRANTING RELIEF 8

I. WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT TO SELF-REPRESENTATION, THE LIMITED PARTICIPATION OF STANDBY COUNSEL DOES NOT ABROGATE HIS EXERCISE OF THE RIGHT ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF 8

II. THE FIFTH CIRCUIT HAS EXTENDED *FARETTA V. CALIFORNIA* BY ESTABLISHING A PRESUMPTION OF PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF 16

CONCLUSION 21

INDEX OF AUTHORITIES

Cases	Page
Berger v. United States, 295 U.S. 78 (1935)	14
Brown v. Wainwright, 655 F.2d 607 (5th Cir. 1982)(*en banc*)	19
Carter v. State, 639 S.W.2d 13 (Tex.Ct.App. 1982)	15
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)	10,11,12
Cuyler v. Sullivan, 446 U.S. 335 (1980)	13
Faretta v. California, 422 U.S. 806 (1975)	7,9,12,16,17,18,21
Gideon v. Wainwright, 273 U.S. 335 (1963)	14
Jackson v. Denno, 372 U.S. 335 (1964)	14
United States v. Atkinson, 397 U.S. 157 (1936)	15
United States v. Frady, _____U.S._____, 102 S.Ct. 1583 (1982)	17
Wiggins v. Estelle, 681 F.2d 266, *reh. denied*, 691 F.2d 213 (5th Cir. 1982)	2,4,11,17,20
Wiggins v. State, 520 S.W.2d 780 (Tex.Crim.App. 1975)	3
Statutes	
U.S. Const. art. VI	2
U.S. Const. art. XIV	2
28 U.S.C. §1254(1)	2
S.Ct.R. 20.1	2

S.Ct.R. 34.1(a) 15

Rule 52(b), F.R.Crim.Proc 15

Rule 103(d), F.R.E 15

NO. 82-1135

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CARL EDWIN WIGGINS,
Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF FOR PETITIONER

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES W. J. Estelle, Jr., Director, Texas Department of Corrections, Petitioner herein, by and through his attorney, the Attorney General of Texas, and submits this his brief.

OPINIONS BELOW

The unpublished opinion of the district court in *Wiggins v. Estelle*, No. SA-79-CA-123 (W.D.Tex. 1979) is reproduced at Appendix C in the petition for writ of certiorari, (hereinafter App. C). The opinions of the United

States Court of Appeals for the Fifth Circuit are published as *Wiggins v. Estelle*, 681 F.2d 266, *reh. denied*, 691 F.2d 213 (5th Cir. 1982), and appear as Appendices B and A in the petition for writ of certiorari. (hereinafter App. B, and App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 26, 1982. A timely filed petition for rehearing *en banc* was denied on November 8, 1982. The petition for writ of certiorari was filed within sixty days of final judgment in this case, S.Ct.R. 20.1, and was granted on February 22, 1983. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

United States Constitution, art. VI, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... and to have to Assistance of Counsel for his defense.

United States Constitution, art. XIV, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Petitioner has custody of Respondent pursuant to a judgment and sentence of the 187th Judicial District Court of Bexar County, Texas. In January, 1973, Respondent originally was tried and found guilty of the offense of robbery, and his punishment was assessed at life imprisonment. On March 21, 1973, however, this conviction was set aside and a new trial was ordered due to a defective indictment. Respondent was reindicted for the robbery and trial in this cause began on June 4, 1973. At trial, Respondent asserted his desire to waive the assistance of counsel and to conduct his own defense. The trial court granted him the right to do so, but kept two appointed attorneys as standby counsel. On June 8, 1973, Respondent was found guilty of the offense. Punishment again was assessed at life imprisonment.

Respondent appealed to the Texas Court of Criminal Appeals and expressed his desire to waive appellate counsel and represent himself on appeal. Several months later, however, he requested the appointment of counsel. Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty (150) page appellate brief. The Texas Court of Criminal Appeals affirmed the conviction on March 26, 1975, in *Wiggins v. State*, 520 S.W.2d 780 (Tex.Crim.App. 1975).

Respondent then filed in the state courts five applications for habeas corpus relief and hundreds of pages of various pleadings. Respondent also has filed several prior applications for federal habeas corpus relief. A petition for writ of certiorari was denied by this Court on November 13, 1978.

In the instant cause Respondent applied to the United States district court again seeking federal habeas corpus relief in *Wiggins v. Estelle*, No. SA-79-CA-128. On August 25, 1980, the district court entered an order adopting the findings and recommendations of the Magistrate and denying habeas corpus relief. The opinion of a panel of the United States Court of appeals for the Fifth Circuit, reversing the decision of the district court and ordering that habeas relief be granted, was handed down on July 26, 1982; rehearing *en banc* was denied on November 8, 1982, with five judges dissenting. *Wiggins v. Estelle*, 581 F.2d 266 (5th Cir. 1982), *reh. denied* 591 F.2d 213 5th Cir. 1982). The petition for writ of certiorari was granted on February 22, 1983.

B. Statement of the Facts

On April 16, 1973, Respondent filed a request for appointed counsel prior to his second trial, specifically stating that he wished to rescind his earlier waiver of counsel (R. 584). On April 17, 1973, the trial court entered an order appointing attorney Benjamen Samples (R. 586). Thereafter Respondent continued to act in his own behalf. He filed a motion for a transcript of his prior trial, a motion to suppress the identification of the complaining witness, motions for witness fees and subpoenas, requests for a speedy trial and a change of venue, and a writ of habeas corpus (R. 590-613). On May 26, 1973, however, he filed an additional request for counsel (R. 623). On May 31, 1973, the trial court appointed additional counsel, R. Norvell Graham, to assist Respondent (R. 625). Nevertheless, Respondent continued to act in his own behalf, filing a motion for special relief, a motion in limine, a bill of exceptions and another special plea, and a motion for a jury shuffle (R. 628-649).

Pre-trial hearings began on June 4, 1973. Respondent, against the advice of one of the attorneys, announced ready for trial (R. 7-11). Conflict arose between Respon-

dent and the attorneys on this matter, and the trial court stated on the record that Respondent was exercising his right to represent himself and that the attorneys were appointed as standby counsel to consult with him when he so desired or when the trial court directed him to do so (R. 12-14). Thereafter, the court began consideration of Respondent's *pro se* motions (R. 14, 17, 21, 23, 31). During a lengthy discussion concerning discovery, counsel voiced a few requests for particular discovery, and argued in support of them, to which action Respondent made no objection (R. 32, 34, 35, 36, 37). At one point, Respondent halted the discussion and asserted his desire to proceed *pro se* (R. 39). Respondent was instructed that he might be required to consult with counsel on occasion (R. 40). Additional motions were then presented by Respondent (R. 42, 43, 44), and he personally conducted the examination of a witness concerning one of the motions (R. 47-55). Four times during the examination Graham assisted Respondent; no objection was made at any time to Graham's actions, and, at least once, Respondent specifically *approved* counsel's actions (R. 50, 51, 52, 54). Thereafter, Respondent alone argued additional motions (R. 57-63).

Pre-trial hearings continued on the morning of June 5, 1973. The trial court refused to dismiss the standby attorneys and refused to enter a specific order restraining the actions of counsel; rather, the court determined to take up individually any problems which arose between Respondent and counsel (R. 67). Additional *pro se* motions were then made and argued by Respondent R. 67-70).

The first jury panel was instructed that Respondent was exercising his right of self-representation, and that standby counsel was appointed to assist him (R. 71-72). At one point in the proceedings, the trial court erroneously informed the panel that Respondent was being tried as a repeat offender; counsel objected to this,

and moved for a mistrial, and Respondent specifically agreed (R. 81-82). The panel subsequently was quashed. The second panel was instructed as to Respondent's election to represent himself (R. 84), and Respondent made his opening statement to the panel (R. 101-104). Thereafter, Respondent conducted the *voir dire* examination for the defense *entirely* without assistance or interference from counsel (R. 106, 109, 112, 115, 118, 120, 122, 124, 127, 129, 133-6, 143, 147, 148, 151, 154, 156, 159, 161, 162, 167, 170, 172, 175, 177, 180, 182, 185). Thereafter, the jury was sworn and testimony began. Thus, the jury which tried Respondent was examined and selected by Respondent alone.

During all trial proceedings, Respondent examined and cross-examined witnesses, made objections to evidence and arguments, chose which defensive theories and witnesses he would present before the court, and argued his case to the jury at both stages of the bifurcated trial. During portions of the trial, Respondent *accepted* the assistance and aid of his standby counsel; during other portions he totally rejected any action taken on his behalf. While Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this action provoked no complaint or objection by Respondent (R. 196, 204, 235, 243, 261, 262, 287-9, 294, 301, 302, 339, 342, 373, 420, 421, 447, 524, 525, 526, 527, 529, 530, 539). Moreover, on various occasions, Respondent specifically *adopted* counsel's objections (R. 447-449, 342-344). During other portions of the trial, *both* Petitioner and counsel made objections and argued the same matters, cross-examined the witnesses, and argued to the jury.

Several times during the trial, a conflict arose between Respondent and standby counsel as to matters involving trial strategy. Each time, the trial court recognized

Respondent's right to make the necessary decisions as to the conduct of the trial, and *sustained Respondent's position* (R. 7-13, 253, 306-309, 341-346, 414, 415, 422, 427, 447, 449-450, 498-499, 544-545). At various other times, when counsel indicated that he wanted to interject matters into the proceedings, the trial court specifically inquired as to whether counsel had Respondent's permission to do so (R. 210, 306, 307, 341-342, 427).

SUMMARY OF THE ARGUMENT

The issue of first impression presented by this case concerns the question whether a criminal defendant's rights under *Faretta v. California*, 422 U.S. 806 (1975) are violated when standby counsel intermittently offers his assistance during the trial. The record reflects that Respondent, who asserted his right of self-representation in his 1973 aggravated robbery trial, actually managed, controlled and conducted his own defense. The court below, however, held that the limited assistance provided by standby counsel wholly abrogated the defendant's exercise of his right of self-representation and that federal habeas corpus relief was mandated by the Sixth Amendment. As was stated by the judges dissenting to the denial of rehearing *en banc*, the rule that standby counsel is "to be seen and not heard" and the presumption of prejudice established where standby counsel offers assistance, "defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in the impractical, inflexible strait-jacket." Additionally, the holding of the court below represents an unwarranted extension of *Faretta*. The essence of the right protected by *Faretta* is the genuine opportunity to participate in and manage the conduct of the defense. This, Respondent certainly had. The presumption of prejudice applied by the court below when standby counsel is "heard as well as seen" ignores

the fact that Respondent had a genuine opportunity to act in his own behalf in the criminal proceedings against him. This presumption establishes a rigid and unworkable rule, which could operate to the detriment of the criminal defendant, the state, and the entire criminal justice system. Because of the varying interests at stake, this Court should balance these considerations, and should adopt a rule which requires an inquiry into the defendant's genuine opportunity to conduct his own defense. Accordingly, the decision of the United States Court of Appeals for the Fifth Circuit should be reversed.

REASONS FOR GRANTING RELIEF

I. WHERE A DEFENDANT INVOKES HIS *FARETTA V. CALIFORNIA* RIGHT OF SELF-REPRESENTATION, THE LIMITED PARTICIPATION OF STANDBY COUNSEL DOES NOT ABROGATE HIS EXERCISE OF THE RIGHT ENTITLING HIM TO FEDERAL HABEAS CORPUS RELIEF.

In *Faretta v. California*, 422 U.S. 806, (1975), this Court recognized the constitutional right of an accused to dispense with the assistance of counsel and conduct his own defense, since the right to defend is personal and since the accused ultimately must bear the consequences of a conviction.

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . .The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails.
>
> The counsel provision supplements this design. It speaks of the "assistance" of counsel,

> and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant. . . .To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists...
>
> Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.

Faretta v. California, 422 U.S. §20-21. Further, this Court held,

> Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

422 U.S. at 834.

Thus, unlike other constitutional rights, the right to proceed *pro se* does not concern a criminal defendant's right to a fair trial, as it is not "result-oriented; rather the right is based upon respect for personal autonomy

and "the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law." *Chapman v. United States*, 553 F.2d 886, 891 (5th Cir. 1977).

The Respondent in the instant case, tried in 1973,[1] requested and received his right of self-representation. Two standby attorneys, however, were retained by the trial court to assist and advise Respondent. The record reflects that one of these attorneys, Norvell Graham, participated to a limited extent, sometimes at Respondent's request, sometimes with his acquiescence and sometimes objectionably to him. The record as a whole, however, reflects that Respondent acted in the capacity of his own counsel, controlling, managing and presenting his defense before the jury. Most discussions as to strategy between Respondent and his standby counsel occurred out of the jury's presence. Each time there was any conflict between Respondent and standby counsel, the trial court recognized Respondent's right to make the necessary decisions as to the conduct of the trial, and sustained Respondent's position.

Thus, the record as a whole conclusively demonstrates that Respondent acted as his own counsel and actually controlled the conduct of the proceedings at trial. His personal decisions in proceeding to trial, examining and selecting the jury panel, making an opening statement, cross-examining the State's witnesses, selecting his defensive theory, deciding which witnesses to present, examining his own witnesses, making objections to evidence and arguing points of law to the court, and arguing his case to the jury, clearly show that he managed and controlled his own defense within the meaning of *Faretta*.

---

1. Respondent was tried prior to this Court's decision in *Faretta*; the trial court, however, ruled that Respondent had the right to proceed *pro se*.

The essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity personally to participate in the trial of the case before the finders of facts. This, Respondent clearly did. The record supports findings that Respondent, in exercising virtually exclusive management over the trial on the merits, clearly represented himself.

Nevertheless, the panel opinion held:

> . . .the rule that we establish today is that court-appointed standby counsel is "to be seen, but not heard"

681 F.2d at 273, and found that the limited participation of counsel completely abrogated Respondent's exercise of his right of self-representation.

As the opinion dissenting from rehearing *en banc* stated,

> The importance of this case arises from the fact that the rule enunciated therein that standby counsel is "to be seen and not heard" creates numerous difficulties for trial court judges in their conduct of criminal trials. This rule defies the rough-and-tumble realities of a fast-moving criminal trial and places judges in an impractical, inflexible strait-jacket. I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error. (footnote omitted).

691 F.2d 213, 215 (5th Cir. 1982).

Where a state criminal defendant, as here, is permitted to proceed *pro se*, the standard of review should be not whether standby counsel interjected himself into the trial proceedings in any way, but rather should focus on whether the *pro se* defendant was afforded a *genuine op-*

portunity to conduct his defense. In *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977), a lower court discussed an appropriate standard of review of abrogation of the right to proceed *pro se*, and iterated that because the right of self-representation is not "result oriented," the normal operation of the harmless error doctrine is inapplicable. Rather, that court suggested that the appropriate inquiry is whether a *pro se* defendant has been afforded a *genuine opportunity* to conduct his defense. 553 F.2d at 891 n. 9. The court below noted this language in *Chapman*, but nowhere did it discuss or consider whether Respondent had such a "genuine opportunity," or the applicability of this suggested standard of review. The test adopted by the lower court, that *any* interjection of standby counsel constituted federal constitutional error, should be rejected.[2]

In additional, the test adopted by the lower court establishes a rule which totally binds the hands of a trial judge confronted with a defendant exercising his *Faretta* right. Under this test, standby counsel would be absolutely prohibited from speaking up in the *pro se* defendant's behalf, no matter what the circumstances, unless the defendant, on the record, requested him to do so.[3]

---

2. The opinion correctly pointed out that the application of this rigid test could result in defense counsel "sandbagging" the prosecution. 681 F.2d at 274.

3. The lower court made it clear that once a defendant invoked his Faretta right, "there will be no question of aquiescence [in counsel's participation] unless [it] has been overtly encouraged." Thus, it must appear *on the record* that the defendant is seeking counsel's assistance. Under these circumstances, the defendant must request assistance before the jury, or must request that the jury be removed so that he may make the request. In order to insure that the record affirmatively reflects that the defendant is overtly encouraging counsel's assistance, the trial court or prosecutor may deem it necessary to dictate into the record that counsel and the defendant

footnote continued on following page

This rigid and unbending rule would not serve the interests of justice. In *Cuyler v. Sullivan*, 446 U.S. 335, (1980), this Court stressed that:

> . . .a state criminal trial, a proceeding initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment (citations omitted). . .

446 U.S. at 343. This Court continued, that when the state obtains a criminal conviction through a trial in which procedural and substantive safeguards are denied, it is the state that unconstitutionally deprives the defendant of his liberty, since the "[s]tate's conduct of a criminal trial itself implicates the state in the defendant's conviction." 446 U.S. at 344-45. Thus, the state, too, has a strong interest in obtaining lawful criminal convictions.

This interest was recognized in *Faretta*, wherein it was stated that it could not be suggested,

> that the quality of [a defendant's] representation at trial is a matter with which only the accused is legitimately concerned. . .Although we have adopted an adversarial system of criminal justice, see *Gideon v. Wainwright* [273 U.S. 335 (1963)], the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial."

---

footnote continued from previous page
are conferring. Under the lower court's opinion, it would be insufficient for the record to merely reflect that the defendant conferred with standby counsel, and that counsel thereafter participated without protest by the defendant.

422 U.S. at 839 (Burger, C.J., dissenting).

Petitioner urges that the rigid holding of the court below ignores the basic principle that "the interest of the State in a criminal prosecution 'is not that it shall win a case, but that justice shall be done.'" 422 U.S. at 849 (Blackmun, J., dissenting) *quoting*, *Berger v. United States*, 295 U.S. 78, 88 (1935).

To require the trial court and standby counsel to remain mute throughout the proceedings, no matter what transpires,[4] which is the ultimate result dictated by the lower court's opinion, may be detrimental to the interests of the defendant and also the state in ensuring fundamental fairness in criminal proceedings. [5] While the state's interest may not supersede a defendant's interest in exclusive management of his trial, that interest at least should be considered in determing whether a rigid test for constitutional error should be established, or whether the proceedings should be reviewed on a case

4. The lower court strongly implied that the trial court should have ordered standby counsel to remain mute, rather than determining to take up problems on an individual basis.

5. *E.g*: Under the test established by the panel opinion, if standby counsel heard evidence that the *pro se* defendant's confession might have been involuntary and brought that to the attention of the trial court, which then conducted a *Jackson v. Denno*, 378 U.S. 368 (1964) hearing and suppressed the confession, this action of counsel would constitute error of constitutional dimension. Further, pursuant to the standard adopted in the panel opinion, it would constitute *harmful* constitutional error, entitling the defendant to federal habeas corpus relief, since the request was at odds with the defendant's wishes and certainly contravened the interests of the defendant as set out in the lower court's opinion.

by case basis, to determine whether the *pro se* litigant was afforded a genuine opportunity to conduct his defense.[6]

Finally, although this Court in *Faretta*, held that a defendant who knowingly and intelligently elects to represent himself cannot thereafter complain that his defense was ineffective, it must be remembered that state and federal appellate courts retain the authority to set aside convictions based upon "plain error" or where it is "in the interest of justice." *See, United States v. Atkinson*, 397 U.S. 157 (1936); *Carter v. State*, 639 S.W.2d 13 (Tex.Ct.App. 1982); S.Ct.R. 34.1(a); Rule 103(d), F.R.E.; Rule 52(b), F.R.Crim.Proc. Recognition of this fact is particularly critical in light of the lower court's holding that any participation of standby counsel constitutes error, and the holding that counsel must be "seen and not heard." Thus, if error occurred at the trial which escaped objection by the *pro se* defendant, standby counsel would be prohibited from bringing it to the attention of the court in the presence of the jury, or at all if the *pro se* litigant protested.[7]

In this case, standby counsel's "interference" successfully prevented Respondent from being tried before a jury panel which was instructed prior to trial that he

---

6 . Without the benefits of an adversarial system, the trial court and prosecutor must maintain vigilance to insure that the proceedings conducted are fair to the *pro se* defendant, and that he is not unduly prejudiced by this ignorance of the law or inability to protect his interests. Nevertheless, the perfect trial has yet to be conducted, and it may be that there will be instances where through inadvertence or inattention, the *pro se* litigant will stand alone, unprotected by the benevolence or accomodation of the trial court or prosecutor. It is this that standby counsel may seek to avoid, by interjecting himself into the proceedings if necessary.

7 . See note 5, *supra*.

was a repeat offender. The trial judge, who usually tried civil cases, mistakenly informed the panel of this fact; upon standby counsel's objections, the panel was quashed (R. 81-82). Had counsel not called the court's mistake to his attention, possibly it would have gone unnoticed until the appellate record was prepared. While the effect on appeal of such unobjected to error is unclear, it is clear that Respondent readily joined in the objection, accepted the benefit and likely obtained a fairer trial before a jury which was unaware of his prior criminal history.

In reviewing the rigid standard established by the lower court, Petitioner urges this Court to balance the interests of the defendant, the state and the criminal justice system in insuring fundamental fairness in state criminal proceedings. To adopt the inquiry whether a *pro se* litigant had a genuine opportunity to represent himself even if standby counsel volunteered assistance, would go far to protect the counterveiling interests involved, while protecting the litigant's established *Faretta* right.

Petitioner urges this Court to overrule this rigid test established by the court below for constitutional error, *i.e.*, whether standby counsel had been heard as well as seen, and to establish a standard of review which inquires into the *pro se* defendant's genuine opportunity to manage, control and conduct his defense at trial.

II. THE FIFTH CIRCUIT HAS EXTENDED *FARETTA V. CALIFORNIA* BY ESTABLISHING A PRESUMPTION OF PREJUDICE WHERE STANDBY COUNSEL ASSISTS A *PRO SE* DEFENDANT, EVEN THOUGH THE DEFENDANT HAD A GENUINE OPPORTUNITY TO REPRESENT HIMSELF.

The lower court's rigid review of standby counsel's conduct and the presumption of prejudice established are unwarranted. As noted by the opinion:

> [t]he *Chapman* decision did leave room, however, for a finding of harmless error if the defendant was "afforded a genuine opportunity to help conduct his defense." 533 F.2d at 891 n.9.

681 F.2d at 274, n.26. The court subsequently, however, found that speculation as to actual harm suffered by the Respondent through standby counsel's conduct was unnecessary, as it found that a presumption of prejudice would be applied wherever a standby attorneys is "heard as well as seen" A presumption of prejudice in these situations is unwarranted. *See e.g., United States v. Frady*, _____U.S. _____, 102 S.Ct. 1584 (1982).

In addition, the lower court noted that while:

> [i]nterjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted. Conceivably, a defendant could become so frustrated or flustered by standby counsel's interference as to be unable to regain his composure by the time the jury returned.

691 F.2d at 274, n.27.

There is no basis for assuming that any comment made by standby counsel in the presence of the jury is inherently prejudicial to a defendant's exercise of his right of self-representation. Neither is this presumption mandated by *Faretta*; rather, it represents an unwarranted extension of *Faretta*, and grants to a *pro se* defendant the constitutional right to be free of any utterance

by his standby counsel, with a presumption of harm if he is not. Surely this broad construction of *Faretta* was not intended by this Court, since the essence of the right protected in *Faretta* is the opportunity to manage and participate in the conduct of the defense.

Further, the lower court's findings that discussions with or statements by standby counsel out of the presence of the jury "are not to be disregarded" because the defendant may become "frustrated or flustered," effectively tie the hands of both the trial court and counsel, for fear of later claims by a defendant that discussions of law or strategy "upset" him.

In addition, this language may well result in much confusion to bench and bar. The opinion noted:

> . . .in the interest of justice, the court or standby counsel may wish to draw the defendant's attention to some legal aspect of which he may be painfully unaware. In such instances the court, either on its own or after being asked by standby counsel, may *request* that the accused confer with counsel.

681 F.2d at 273, n.24. Yet in its discussion of the presumption of prejudice arising when standby counsel speaks, the lower court found that these discussions "are not to be discounted" in determining prejudice to the defendant. Thus, if standby counsel, perceiving some grave danger to the defendant's case, requests that the trial court retire the jury so that the matter can be explained to the defendant, standby counsel commits constitutional error. If the jury is removed and the legal matter is brought to the defendant's attention, it is quite conceivable that he later could claim that this diversion frustrated or flustered him, or that the mere act of counsel in requesting that the jury be removed

was sufficient to prejudice him before the jury or that it had a "negative impact" upon his self-representation. Thus, how the trial court and standby counsel are to walk this fine line is very unclear indeed, given the lower court's rigid test for constitutional error and its presumption of prejudice. Petitioner urges this Court, instead, to adopt the "genuine opportunity" inquiry as the standard of review and test for prejudice.

In *Brown v. Wainwright*, 655 F.2d 607 (5th Cir. 1982) (*en banc*), the defendant first invoked his *Faretta* right at the outset of his trial; however, during the course of trial proceedings, his subsequent conduct and behavior were found to constitute a waiver of his right. Petitioner urges that this represents the better approach. The lower court's treatment of Respondent's requests for standby counsel's assistance from time to time and his acquiescence in counsel's assistance on occasions is inconsistent with any notion to a *pro se* defendant may, by his conduct, waive self-representation. While clearly Respondent in the instant case never waived his *Faretta* right entirely, the record reflects that from time to time he sought out counsel's affirmative participation and then acquiesced in his services, which constituted a waiver during those moments of claims of "interference" by standby counsel.

The record reflects that Respondent more often than not approved of counsel's limited assistance at trial. On various occasions, Respondent adopted counsel's objections. Other times, Respondent acquiesced in counsel's assistance. During some portions of the trial both Respondent and counsel argued, at Respondent's request. If any conflict in trial strategy arose between the two, the trial court, after ascertaining Respondent's wishes, *always* sustained Respondent's position. Other times, when counsel indicated that he wished to make some point, the trial court specifically inquired whether counsel had Respondent's permission to do so. Finally,

most instances when Respondent and counsel disagreed as to strategy occurred entirely out of the presence of the jury. Each time Respondent's position was sustained by the trial court.

The lower court, however, wholly discounted Respondent's requests for counsel to assist him and his frequent acquiescence in and approval of counsel's participation, in finding that counsel's participation and assistance constituted harmful constitutional error. Further, the lower court failed to point out that Respondent's strategic decisions were always sustained, and the majority of the conflict between the two occurred out of the presence of the jury. Moreover, the panel admittedly engages in speculation regarding harm to Respondent. Finally, the panel states:

> Once the right of self-representation has been asserted there will be no question of acquiescence unless counsel's participation has been *overtly encouraged* by the defendant.

681 F.2d at 275 (emphasis added). The opinion, however, ignored the fact that portions of counsel's assistance *were* overtly encouraged by Respondent. Respondent's conduct in requesting counsel's assistance and adopting his legal theories constitutes a waiver of objection as to that extent of counsel's participation.

Because the record reflects Respondent alone made the decision to proceed to trial, conducted the jury *voir dire*, selected the jurors, examined and cross-examined witnesses, made tactical and strategic decisions, chose and presented his defensive theories, made objections to evidence and argued in support of his position, made objections to the court's charge and submitted requested charges, and argued his case to the jury at both phases of the trial, the lower court's holding that the limited assistance of standby counsel constituted harmful con-

stitutional error entitling Respondent to federal habeas relief, should not stand. This Court should reject the Fifth Circuit's adoption of a presumption of prejudice where standby counsel in any way assists a *pro se* defendant, who had a genuine opportunity to conduct his own defense within the meaning of *Faretta*.

CONCLUSION

For these reasons, Petitioner prays that the judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
Executive Assistant
Attorney General

NANCY M. SIMONSON
Assistant Attorney General
Acting Chief,
Enforcement Division

LESLIE A. BENITEZ
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Petitioner

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office - Supreme Court, U.S.
FILED
JUL 6 1983
STEVAS
CLERK

NO. 82-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CARL EDWIN WIGGINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT

Craig Smyser
VINSON & ELKINS
3100 First City Tower
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel for Respondent

CLB PUBLISHERS & LITHOGRAPHERS, INC. • (301) 933-5220

QUESTIONS PRESENTED

I. DID THE ACTIONS OF STANDBY COUNSEL DENY RESPONDENT HIS RIGHT TO REPRESENT HIMSELF?

II. IS THE HARMLESS ERROR DOCTRINE APPLICABLE TO THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION IN THIS CASE?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Course of the Proceedings Below 1

B. Statement of the Facts 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. RESPONDENT WAS DENIED THE EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF 5

A. The Right of Self-Representation Provides More than a Genuine Opportunity to Conduct a Defense; It Protects the Accused's Right to Present His Personal Defense 8

B. The Record Reflects That Respondent was Denied Exercise of His Right of Self-Representation, Under Either Petitioner's or Respondent's Definition of the Right 12

C. This Court's Waiver Decisions Preclude A Pro Se Defendant or Standby Counsel From Sandbagging a Trial Court 22

II. IN THIS CASE, THE HARMLESS ERROR DOCTRINE IS NOT APPLICABLE TO THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION 27

A. Denials of the Right of Self-Representation Can Never Be Harmless 27

B. The Denial of the Right of Self-Representation Was Not Harmless Error Under the Facts of This Case 34

CONCLUSION 36

TABLE OF AUTHORITIES

Case *Page*

Bittaker v. Enomoto,
587 F.2d 400 (9th Cir. 1978), *cert. denied*,
441 U.S. 913 (1978) 28

Chapman v. California,
386 U.S. 18 (1967) 27,30

Chapman v. United States,
553 F.2d 886 (5th Cir. 1977) 11,29,35

Connecticut v. Johnson,
103 S. Ct. 969 (1983) 30

Engle v. Isaac,
456 U.S. 135 (1982) 24,25

Faretta v. California,
422 U.S. 806 (1975) ..... *passim*

Glasser v. United States,
315 U.S. 60 (1942) 28

Harrington v. California,
395 U.S. 250 (1969) 30

Holloway v. Arkansas,
435 U.S. 475 (1978) 28

In re Little,
404 U.S. 553 (1972) 14

Milton v. Wainwright,
407 U.S. 371 (1972) 30

United States v. Dougherty,
473 F.2d 1113 (D.C. Cir. 1972) 9,31

United States v. Frady,
102 S. Ct. 1584 (1982) 32

United States v. Hasting,
103 S. Ct. 1974 (1983) 27,30

United States v. Juelich,
342 F.2d 29 (5th Cir. 1965) 30

Wainwright v. Sykes,
433 U.S. 72 (1977) 24

Wiggins v. Estelle,
681 F.2d 266 reh'g denied 691 F.2d 213
(5th Cir. 1982) ..... *passim*

Young v. State,
653 P.2d 153 (Nev. 1983) 28

STATUTES

U.S. Const. amend. VI ..... *passim*

ARTICLES AND TREATISES

ABA Guidelines for the Administration of Criminal
Justice (2d ed. 1980) 26

BOOKS

MORROW'S INTERNATIONAL DICTIONARY
OF CONTEMPORARY QUOTATIONS
(J. Green ed. 1982) 13

WEBSTER'S THIRD NEW INTERNATIONAL
DICTIONARY OF THE ENGLISH LANGUAGE
UNABRIDGED (1969) 35

STATEMENT OF THE CASE

A. Course of the Proceedings Below.

Although Respondent agrees generally with Petitioner's description of the proceedings below, Respondent writes to emphasize that he pleaded not guilty to the charges in the trial court and has continued to maintain his innocence of the charges. In connection with the federal district court's disposition of Respondent's application for writ of habeas corpus, Respondent would also point out that the court denied habeas relief without conducting an evidentiary hearing. Respondent contended in his appeal to the Fifth Circuit that the district court should have conducted an evidentiary hearing; due to the Fifth Circuit's reversal of the district court's decision, however, the appellate court did not reach Respondent's complaint on this point. Respondent has not abandoned this alternative claim.

B. Statement of the Facts

Respondent does not accept Petitioner's statement of the facts, largely because it contains Petitioner's interpretation of the facts and, in many instances, argument from the facts. Because the actual words and actions of the participants to this trial form the crux of the argument in this case, Respondent will refrain from arguing his case at this stage of the brief and refers the Court to his Argument for rendition of the facts. Nonetheless, certain assertions in Petitioner's statement of facts must be dealt with at this point.

The case arises out of the robbery of a Piggly Wiggly grocery store in San Antonio, Texas in the early evening of January 17, 1972. After the cashier stuffed money into a brown paper bag held by a man holding a rusty pistol, the

robber fled the store. A store employee wrote down the license plate number of a car the robber allegedly fled in, and that number was subsequently traced to a car owned by Carl Edwin Wiggins, who lived in Corpus Christi and who was contacted in his home in Corpus Christi only several hours after the robbery. After state courts dismissed two indictments because of defects, the trial that is the subject of this appeal began on June 4, 1973, a year and one-half after the offense occurred. In the afternoon of June 7, 1973, the jury began its deliberations, and, although the jurors announced several times later that night and the next day that they were deadlocked, the court refused to discharge them. (R. 508-15). The jury finally reached its verdict the afternoon of June 8, 1973. (R. 515).

Respondent's principal objection to Petitioner's statement of the facts is that it frequently indicates that Respondent approved of standby counsel's actions when in fact the passages cited by Petitioner often evidence no such acquiescence, and the only way to reach Petitioner's conclusion is to make assumptions about Respondent's state of mind. An equally plausible explanation for Respondent's actions at these moments is that Respondent elected not to quarrel with standby counsel so as to avoid disrupting the trial. (See: Petitioner's Brief at 5 wherein Petitioner claims that "at least once, Respondent specifically approved counsel's actions. (R. 50, 51, 52, 54)," and Petitioner's Brief at 6 wherein Petitioner claims that "[w]hile Respondent now complains of the actions of standby counsel, he more often than not approved of counsel's actions at trial. At various times during the trial, where counsel assisted in making objections or arguments, this action provoked no complaint or objection by Respondent," followed by numerous citations to the record.)

The facts demonstrate that standby counsel, over Respondent's repeated objections, continually interjected himself into the trial. (See, e.g. J.A. 8, 20). This unwanted participation included making motions on counsel's own intiative, giving orders to Respondent, cursing in the courtroom, and contradicting specific requests of the trial court and Respondent. (See, e.g. R. 345-46). Since it is the character, type and number of these interferences that Respondent contends deprived him of his Sixth Amendment right to represent himself, further discussions are reserved for Respondent's argument.

SUMMARY OF THE ARGUMENT

Respondent contends that the repeated, unwanted interjections by standby counsel prevented Respondent from exercising his Sixth Amendment right to represent himself. The actions complained of were not isolated, incidental interferences with Respondent's attempt to present his defense; rather, as the record demonstrates, standby counsel did everything but stand by: he initiated action on his own; he made motions for mistrial after Mr. Wiggins had specifically asked that he not do so; he cursed in the courtroom, both in and out of the presence of the jury; he intimidated Respondent by directing him on occasion to "shut up" or to "sit down;" and he destroyed any notion that Respondent was conducting a coherent, personal defense. These actions violated the unambiguous guidelines for standby counsel this Court established in *Faretta v. California*, 442 U.S. 806 (1975) wherein the Court said that standby counsel should aid the accused if and when the accused requested help.

The right to represent oneself surely encompasses more than the ability to appear at trial in order to contend with an unwanted court-appointed counsel for presentation of arguments to the jury. *Faretta* held that the right was given personally to the accused, as the accused bore the consequences of the verdict. The right, then, means not only that the accused has control over his defense, but also that he be able to personally present the defense of his choice. To hold otherwise would be to strip the right of self-representation of any meaningful content.

As a practical matter, a defendant who chooses to represent himself will be without the trial skills of an experienced advocate. Some pro se defendants will knowingly and some will unwittingly fail to object at trial to violation of their constitutional rights. Such a result derives inevitably, however, from the right of self-representation and does not argue for any special role for standby counsel as an indirect means of gutting a person's right to represent himself. A pro se defendant should not be treated any differently, insofar as his procedural waiver arguments and his tactical and strategical trial decisions are concerned, than a defendant represented by a lawyer.

The harmless error doctrine is logically incompatible with the analysis of the denial of the right of self-representation. Like its counterpart, the right to counsel, the right of self-representation is one of those rights so basic to a fair trial that its denial can never be harmless error. Since denial of the right of self-representation affects the conduct of the entire trial, attempting to assess the effect of the denial on the trial requires the reviewing court to speculate to a much greater extent than it does when reviewing the effect of a single piece of evidence or an erroneous jury instruction. Likewise, since the right is not related to the trial result and since the

harmless error inquiry focuses on result, the harmless error inquiry is irrelevant to a denial of the right of self-representation. Finally, if the Court adopts a harmless error standard, the inquiry should not focus on the result but should focus on whether the complained of error was more than an incidental interference with the defendant's conduct of his defense.

ARGUMENT

I.

RESPONDENT WAS DENIED THE EXERCISE OF HIS SIXTH AMENDMENT RIGHT TO REPRESENT HIMSELF.

Respondent contends that the actions taken by court-appointed standby counsel during his trial deprived him of his constitutional right to represent himself. Standby counsel continually interrupted the proceedings, made his own objections, ordered Respondent about, cursed, and even disobeyed the trial court's specific instructions designed to restrict his conduct. These actions so disrupted the proceedings that Respondent was prohibited from presenting his defense to the jury and to the court. The right of self-representation entitles a defendant to present his defense personally to the jury and to control tactical and strategical trial procedure. The record of Mr. Wiggins' trial shows that standby counsel's actions deprived Respondent of the Sixth Amendment protection accorded these interests.

When the trial court granted Respondent's request to represent himself in this case, the court also appointed standby

counsel "Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them." (J.A. 7). Although *Faretta* empowered the trial court to appoint standby counsel, it also clearly delineated the role to be performed by standby counsel:

> Of course, a State may — even over objection by the accused — appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.

Faretta v. California, 422 U.S. at 835, n. 46.

These words are not ambiguous or difficult to interpret; they provide specifically that standby counsel is to aid the accused *if and when* the accused requests help and to be prepared to take over the conduct of the trial should the defendant become unruly. Beyond doubt, standby counsel in this case exceeded these clear guidelines; Petitioner does not even attempt to argue otherwise. Moreover, the record reflects that Respondent repeatedly requested, in words almost identical to those quoted above from *Faretta*, that standby counsel serve as a consultant or an advisor rather than initiating actions on his own. When Mr. Wiggins agreed to waive the ten day preparation period for one of his court-appointed counsel, Mr. Graham, who was appointed two days before trial, the court asks:

> THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?
>
> DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.

THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

DEFENDANT: Yes sir, but I would ask the court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

THE COURT: Well —

DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

THE COURT: His availability, yes.

DEFENDANT: May I except to that, Your Honor.

THE COURT: It's in the record.

(J.A. 13-14)

As indicated by the excerpts from the trial record contained in the Joint Appendix, Respondent repeated this request several times during the trial. (J.A. 8, 30, 53, and R. 345-46). Despite Respondent's requests and the trial court's initial description of standby counsel's limited role, Mr. Graham interjected himself into the trial constantly; nearly every page of the Joint Appendix documents some action taken by Mr. Graham that exceeds the guidelines of

Faretta. Respondent claims that standby counsel's violations of the direct, unambiguous guidelines this Court set out in *Faretta* deprived Respondent of the exercise of his Sixth Amendment right to represent himself.

A. The Right of Self-Representation Provides More than a Genuine Opportunity to Conduct a Defense; It Protects the Accused's Right to Present His Personal Defense.

Petitioner does not suggest that standby counsel's conduct did not exceed the clear boundaries articulated in *Faretta;* rather Petitioner contends that so long as Respondent was "afforded a genuine opportunity to conduct his defense," his right to self-representation was not violated and that the plain reading of *Faretta* adopted by the Fifth Circuit should be rejected as too restrictive. Petitioner claims that: "[t]he essence of the right protected in *Faretta* is the control over tactical decisions and defensive strategy, and the opportunity personally to participate in the trial of the case before the finders of facts. This, Respondent clearly did." (Petitioner's Brief at 11). Respondent submits that the right of self-representation recognized by *Faretta* involves more than "a genuine opportunity to conduct a defense."

Petitioner's definition of the right of self-representation would provide a defendant with little more than the vicarious control over important defense decisions which any defendant has, according to the canons of legal ethics, even when represented by a lawyer. At a minimum, the right of self-representation provides a defendant, during the course of the trial of his case, the right to personally present his defense to the trier of fact free from the continual harassment, distraction, and disruption of the proceedings by standby counsel.

Petitioner claims that because the trial court ruled in Respondent's favor every time a conflict arose between Respondent and court-appointed counsel, Respondent controlled his own defense which, in Petitioner's view, is all that is afforded by the right of self-representation recognized in *Faretta*. (Petitioner's Brief at 10-11). *Faretta* does not give so little; *Faretta* recognizes that merely controlling one's own defense is not the same as conducting it or presenting it oneself. "The right to defend is personal," the Court said. "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.' " 422 U.S. at 834 (citation omitted). The right to present your own defense is a logical extension of a criminal justice system, such as our own, in which culpability is based on an individual's responsibility for his acts. The right to self-representation thus strongly implicates our legal system's concern for free choice.[1] A person has the right to be convicted or acquitted with the knowledge that it was his claim the jury considered, presented in his own manner.

As the Fifth Circuit noted in its opinion in this case, there are a number of reasons why a defendant might choose to represent himself. *Wiggins v. Estelle*, 681 F.2d at 271, n.16, reh'g denied, 691 F.2d 213 (5th Cir.). A review of these reasons reveals that they correspond to interests which the

[1]As can be seen, this personal ingredient of the right to self-representation also involves societal concerns for freedom of expression and a public trial. A person engaged in civil disobediance may have resigned himself to conviction, but may wish to represent himself to communicate his arguments and his position on an issue he deems important to the society at large. *U.S. v. Dougherty*, 473 U.S. 1113 (D.C. Cir. 1972).

right of self-representation is designed to protect. Very important among these interests is the defendant's belief that he stands a better chance of acquittal if he presents his own case to the jury. As this Court noted in *Faretta*, "it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense." 422 U.S. at 834.

As the Fifth Circuit observed, an accused:

> ". . . may view self-representation as a means of invoking the jury's sympathy by projecting the image of the lone defendant against the mammoth State. Participation by court-appointed counsel would sour that image in the minds of the jurors. A defendant may also want the opportunity to have the jury judge him as a person, and hopefully decide all matters of credibility in his favor. As part of that plan, he may choose to take a very low key approach to trial, thereby conveying the impression that he has nothing to hide. In this situation, counsel's intrusion may force disagreements and confusion which would undermine the picture the accused wishes to present."

Wiggins v. Estelle, 681 F.2d at 271, n. 16.

A person has more than the right merely to participate personally in his defense when he elects to represent himself — he is not an actor to be wheeled out on the stage for a few lines and then again hidden behind the curtain. *Faretta* held that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." 422 U.S. at 819-20.

As noted in *Faretta*, an "unwanted counsel" — whether standby or appointed representative — represents a defendant only through a legal fiction. "Unless the accused has

acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* at 821. The italics in the original emphasize the personal nature of the defense. These passages simply do not support Petitioner's claim that *Faretta* only affords a defendant some vague control over the defense presented at trial. The concrete practical meaning of the right of self-representation is that the defendant, so long as his behavior is not inconsistent with the orderly progress of the proceedings, has the right individually and independently, which is to say, in person and without unwanted interference from any other individual, to present his defense at his trial. In short, he has the right to act as his own lawyer so long as he does not "abuse the dignity of the courtroom." *Id.* at 835, n. 46.

Petitioner cites *Chapman v. United States*, 553 F.2d 886 (5th Cir. 1977) as the source for its rule that all the Sixth Amendment entitles a defendant to is a genuine opportunity to conduct his defense. A careful reading of footnote 9 in *Chapman*, however, shows that the language the State refers to concerns an appellate court's ability to look behind a formal denial of the right of self-representation to determine whether an accused actually exercised the right at trial. In a discussion of whether denial of the right could ever be harmless error (not a discussion of whether the accused had been denied his right), the court postulated a case where the trial judge formally denied defendant his right to represent himself but then allowed the defendant to conduct his defense, despite the formal refusal. This situation, where the defendant actually conducted his defense, presented an example of the applicability of the harmless error rule in a case involving the right of self-representation, the *Chapman* court said. That hypothetical is the reverse of the facts in this case. As the State's use of

this example demonstrates, however, it is imperative to maintain a distinction between analysis of denial of the right and analysis of whether, once the right has been denied, it can never be harmless error. (See discussion at pp. 29-30, n.7, infra).

One additional flaw in Petitioner's formulation is that it is finally absurd to say that all an accused who asserts his right to represent himself is entitled to is an opportunity — genuine or of any other kind — to conduct his defense. If *Faretta* means anything, it means that every accused has an opportunity to represent himself if he wants it. But if the accused takes advantage of that opportunity, he then has the right to conduct his defense, not the opportunity to conduct it. Petitioner's standard seems to encourage a sort of controlled chaos in the courtroom where, once the trial court grants a defendant the right to represent himself, the defendent must vie with the standby counsel to conduct his defense, and, if he loses, he nonetheless had the opportunity to defend himself, so he should not be heard to complain.

B. The Record Reflects That Respondent Was Denied Exercise of His Right of Self-Representation, Under Either Petitioner's or Respondent's Definition of the Right.

An examination of the record reveals how mistaken it is to say that Mr. Wiggins presented his own defense. In fact, the record indicates that Mr. Wiggins was almost completely denied his right to control independently and present personally his defense. Consider, for example, the manner in which standby counsel gave orders to Mr. Wiggins during the examination of witnesses.

> DEFENDANT: Your Honor, I have some questions relative to the in-Court —

MR. GRAHAM: We will take him on cross-examination.

DEFENDANT: I would like to ask him. They are very relevant.

MR. GRAHAM: You can get him on cross-examination. Sit down.

(J.A. 20).

This exchange was not an isolated instance:

MR. GRAHAM: Ask him one question. Don't sit down and argue.

DEFENDANT: I am sorry.

(J.A. 21).

A true indication, however, of the extent to which standby counsel acted as though he, and not Mr. Wiggins, was in control of the defense (and an indication of his hostility toward the defendant) can be found in this exchange:

DEFENDANT: I want to ask him this question here on this statement that's dated February 15. May I show it to you?

MR. GRAHAM: God damn it. Wait a minute. I am trying to get . . . .

(Thereupon, Mr. Graham conferring with defendant.)

(J.A. 20).

This behavior not only indicates the vigor with which Mr. Graham obstructed Respondent's actual presentation of his defense but also reveals the sometimes crude, ill-mannered tone of Mr. Graham's performance as standby counsel. This Court has never sanctioned this type of language or behavior on the part of an accused and certainly not on the part of an officer of the Court.[2] This Court has stated that profanity in

[2]Chief Justice Burger has compared the importance of civility in a courtroom to the importance of antiseptic in a hospital. MORROW'S INTERNATIONAL DICTIONARY OF QUOTATIONS 311 (J. Green ed. 1982).

the courtroom is "reprehensible and cannot be tolerated." *In re Little*, 404 U.S. 553, 554 (1972). This was not the only time standby counsel cursed on the record. Even though Mr. Wiggins had specifically asked that standby counsel not request a mistrial, counsel ignored the request and, with the jury in the box, moved for a mistrial.

> DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel —
>
> THE COURT: I denied the motion for mistrial. Overruled.
>
> MR. GRAHAM: Jesus Christ.

(J.A. 40).

Regardless of what role standby counsel should play in a trial, it is difficult to imagine that any court would hold that the role should include language and conduct of this kind. Common decency prohibits it. It is also hard to fathom how utterances such as these, and incidents such as those related above, are compatible with the argument that Respondent controlled his defense. Surely not even a defendant represented by a lawyer of his own choice would want his lawyer to act in this fashion in the courtroom.

In addition to these incidents involving the use of profanity and an overbearing demeanor to intimidate Mr. Wiggins and disrupt his presentation of his case, the record indicates that standby counsel frequently made objections without first consulting the defendant who was supposedly controlling his defense. (See, e.g., J.A. 37, 47, 50, 52). Respondent's occasional failure to object to these actions leads Petitioner to claim Respondent in some way approved of standby counsel's conduct or at the very least acquiesced in it. (Petitioner's Brief at 10). An equally plausible explanation, in view of the unseemly behavior of standby counsel, is that Respondent,

who had already seen the jury witness many disagreements between himself and standby counsel, elected not to quarrel with standby counsel on these particular occasions to avoid any possible further aggravation of the jury.

There can be no question of acquiescence, however, in connection with Defendant's request that standby counsel not move for a mistrial. From the start of the trial, Mr. Wiggins expressed a concern with attempts, first by the prosecutor, (J.A. 15), to secure a mistrial, perhaps because, as he told the trial court, "I have been in jail, quite a long time." (J.A. 4). After standby counsel moved for a mistrial, Defendant asked the court to direct standby counsel to refrain from doing so.

> DEFENDANT: Your Honor, may I say something? I would like to say that I ask the Court to ask assistant counsels not to initiate their assistance unless it's — the Court considers it necessary and without unless the defendant asking for their help.
>
> THE COURT: To the extent that in the presence of the jury, I am so instructing them and I think they have been instructed. Now, they are conscientious lawyers —
>
> DEFENDANT: Yes, Your Honor.
>
> THE COURT: — they are experienced lawyers, and what they do within their oaths, they are advising you that they are seeking to advise you as to what they feel is beneficial to you in the trial of this — defense of this case, and I am not going to instruct them out from under their oaths or out from under their duty under these adverse circumstances. I will instruct them on your request that they not object or that they not —
>
> DEFENDANT: Ask for mistrial.
>
> THE COURT: — not do anything without consulting you. That they may consult and advise you as much as they feel it's in your interest and necessary and at other

times when you request it or at additional times when the Court orders it or suggests that there be a conference between you all.

DEFENDANT: Well, Your Honor, at times when the defendant is listening to the testimony and or questioning, cross-examining or examining a witness, now, will you ask counsels to wait until the testimony is over or hold up the proceedings for a moment, because the defendant can't listen to their voice and at the same time listen to the testimony.

THE COURT: All right. You can hold up your hand and I will stop the proceedings.

DEFENDANT: Thank you, Your Honor.

(R. 345-46). Despite this specific request and the court's ruling, standby counsel continued to move for mistrial, without consulting Mr. Wiggins. (J.A. 40, 45).

The disagreement over motions for mistrial demonstrates another deleterious effect of standby counsel's participation: counsel and Respondent were in almost continual disagreement over the tactical and strategical decisions of the defense. In the later stages of the trial, counsel took to dictating his recommendations into the record rather than carrying them out over Respondent's objection, surely a better procedure, but further indication of the extent of the dispute between the two. (J.A. 37, 41-2, 46).

Although the State contends that Respondent had a "genuine opportunity to conduct his defense," the facts related above belie this conclusion. Respondent was no more than one of two persons arguing his case, often in disparate ways, to the jury and to the court.

Respondent repeatedly requested that standby counsel refrain from initiation of any activity; he did not mind consulting with them, but he did not want them taking any actions

independently. These requests were entirely consistent with the role of standby counsel envisioned by *Faretta* and yet throughout the trial the court failed to impose any restrictions on standby counsel's participation or to state clearly standby counsel's role in the trial. The confusion engendered by this reluctance further contributed to Respondent's inability to present effectively his personal defense to the jury.

Almost from the moment the trial began, confusion surrounded the role of standby counsel. Although the trial court appeared to have established the roles of the trial participants when the subject first arose,[3] a dispute ensued almost immediately when Mr. Graham suggested that Mr. Wiggins' son was arrested in connection with the offense, and Mr. Wiggins protested.

DEFENDANT: Your Honor, I would like to defend

---

[3]The trial court's subsequent reluctance to impose restrictions on standby counsel contrasts with the court's initial statements concerning standby counsel's role.

> DEFENDANT: Your Honor, I am defending myself and I feel that relative to the motions that I filed, that they can be heard without the transcript.
>
> MR. SAMPLES: Your Honor, there has — an issue has been raised as to the representation of Mr. Wiggins. The Court did appoint myself, Benjamin Samples to represent Mr. Wiggins, along with Mr. Norvell Graham who is here, and although I understand there was a previous trial and Mr. Wiggins did at that time represent himself, I don't know whether the determination has been made by this Court as to who is going to represent whom.
>
> THE COURT: Well, Mr. Wiggins has a right to represent himself, and under the law the Court has made available to him for consultation and/or use, that he would wish to make within the framework of your professional abilities, both you and Mr. Graham who will be available, that he may consult with whoever he wishes to consult.
>
> Now, as I understand the law, he has a right to represent himself as long as he does that within the framework of the law and the

myself. I would appreciate it, sir if you would ask this man to let me defend myself.

MR. GRAHAM: Certainly. Help yourself.

DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.

THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

DEFENDANT: Yes sir. I am not a lawyer.

THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

DEFENDANT: Yes sir.

THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

---

rules of the proper conduct of the trial.

There may be times when his knowledge and ability is not such that he is doing it properly and it may be that the Court at that time will suggest to him that he consult with counsel, but counsel will be here at the counsel table with him and confer with him as he wishes.

* * *

Let the record show that the defendant, Mr. Carl Edwin Wiggins, has by his own design, elected to be attorney for himself pro se, but that the Court has appointed previously Mr. Ben Samples and also Mr. R. Norvell Graham, both practicing members of the San Antonio Bar, to assist Mr. Wiggins, to advise Mr. Wiggins if he wishes to be advised, or to consult with them when the Court directs he consult with them, that they are here present in Court and available sitting right behind him.

You may proceed.

(J.A. 6-7). As this dialogue indicates, the court apparently originally contemplated a purely standby role for counsel. The role outlined in this statement would appear roughly to conform with the *Faretta* guidelines.

DEFENDANT: Yes sir.

THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult with the attorneys for advice. I will appreciate that, but for counsels to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that.

(J.A. 8-9).

The second manifestation of the trial court's reluctance to establish clearly standby counsel's role during the trial was reflected in the colloquy quoted above (see p. 6-7, supra) involving Mr. Wiggins' waiver of the ten-day preparation period for Mr. Graham when Mr. Wiggins told the court he would appreciate Mr. Graham's assistance if asked for but could not appreciate "volunteer" assistance absent a request. (J.A. 14). The trial court's confusion about the roles of the participants was also evident when it stated to the jury that Mr. Graham and Mr. Samples were appointed "to represent and assist Mr. Wiggins where he desires to use their help." (J.A. 16). Obviously, Mr. Wiggins never asked that standby counsel represent him, but standby counsel could easily have interpreted this language to provide them with license to act as Mr. Wiggins' lawyers, not just as his advisors.

As a result of the trial court's ambiguous statements to the jury concerning standby counsel's role and the court's refusal to restrain counsel, it is unclear whether the court ever actually permitted Respondent to represent himself. The court's rulings indicated that the standby counsel were free to take any action they deemed appropriate and that the court would simply determine the propriety of such action on an ad

hoc basis — "if some problem arises, I (the judge) will act on it at that time." The jury was undoubtedly well aware of this unsettled state of affairs, as the following exchange, wherein Mr. Graham calls himself Respondent's attorney, and which took place in front of the jury, illustrates:

THE COURT: Do you have any additional questions of this witness?

MR. GRAHAM: Your Honor, there is one question that I feel as his attorney should be asked.

THE COURT: Now, counsel, we have ground rules here. The question is whether or not the defendant want (sic) to ask the question.

DEFENDANT: Well, Your Honor, I do have — trying to think of a question or two, but . . . I would like to ask him again . . . if it's . . .

THE COURT: Don't ask him anything that you have asked him before. In other words, don't try to trod on the same ground over and over. The jury heard it. It's fresh in their minds.

MR. GRAHAM: Your Honor —

DEFENDANT: I believe I will pass the witness.

MR. RODRIGUEZ: May he be excused?

MR. GRAHAM: Just a moment. Can we confer? Counsel feels the defendant should require that the question be asked.

THE COURT: Ladies and gentlemen, I have been abusive of you this morning because of various matters that we have had to take up in your absence. I haven't really given you a recess except haphazard ones. On instructions previously given you, I am going to give you a fifteen-minute recess at this time. Remember my instructions. You may go anyplace you like, no farther than seven and a half minutes away.

(Thereupon, jury withdrawn from the courtroom.).

(J.A. 28-29).

Even at this late stage in the trial, the judge attempts to sort matters out between counsel and the accused, by stating that Mr. Wiggins' judgment would control in matters that involve a judgment decision, but the judge also noted that:

> It's peculiar to work under these conditions, but this is what we are going to have to do.
>
> DEFENDANT: May I say it is peculiar to me, Your Honor and I would really appreciate it if I could — if I could conduct my defense without the assistance and interruptions of counsel, with all respect, Mr. Graham.
>
> THE COURT: All right.
>
> MR. GRAHAM: I will sit third chair from now on. I will move back one notch.
>
> THE COURT: I am not going to order you Mr. Graham, because I know you are competent counsel, but let me suggest to you that unless he consults with you — you do your thing anyway, but don't object or don't ask questions unless and until the Court request that you consult with him because he doesn't know the proper way to do something.
>
> DEFENDANT: Thank you, Your Honor.

(J.A. 30-31).

The trial judge's statement vividly expresses the conflicting signals given to Respondent and to standby counsel; standby counsel is to stand by for consultation but also to do his "thing" anyway. Petitioner's characterization of the record in this case as reflecting that standby counsel's conduct did not deprive Mr. Wiggins of his Sixth Amendment right of self-representation is no less contradictory, for it asserts that even when standby counsel repeatedly interrupts, criticizes, curses and attempts to intimidate the defendant and spends a substantial portion of the trial standing up to interject his own statements and questions rather than merely standing by, the

defendant has exercised his constitutional right of self-representation.

The trial court's reluctance to impose any restraints on the conduct of standby counsel can only have led Respondent "to believe that the law contrives against him." *Faretta*, 422 U.S. at 834. Mr. Wiggins, who asserted his innocence at the time and who continues to maintain his innocence of the crime charged, can only wonder what verdict the jury, which several times announced to the court that it was deadlocked, might have returned if he had been permitted to present his defense free from interference.

C. This Court's Waiver Decisions Preclude a Pro Se Defendant or Standby Counsel from Sandbagging a Trial Court.

Although Petitioner does not posit a role for standby counsel in a trial involving a pro se defendant, Petitioner's criticism of the Fifth Circuit opinion centers almost completely on the language in that opinion that establishes guidelines for standby counsel. Reduced to essentials, Petitioner has two criticisms: (1) the rule will allow standby counsel and pro se defendants to sandbag the courts; and (2) the rule will require the trial court to remain mute which may be detrimental to the interests of the State in ensuring fundamental fairness in criminal proceedings. (Petitioner's Brief at 14). The short answer to both criticisms is that when an accused chooses to represent himself, he can waive his constitutional rights just as finally as if his lawyer had done it for him; thus, the guarantees of fairness inherent in trial proceedings are not altered.

The State's sandbagging argument apparently envisions

two types of sandbagging. First, a careless or unscrupulous standby counsel might introduce error into the proceedings by occasionally interjecting a comment or objection that, under the Fifth Circuit's "rigid" rule, would constitute constitutional error. (Petitioner's Brief at 12, n.2). Second, a pro se defendant or standby counsel, when a constitutional violation is being committed, may not raise the point at trial, either through an intentional decision to take a risk on a verdict while reserving the constitutional argument for appeal, or through ignorance. Although this second type of sandbagging was only hinted at in Petitioner's Brief at 14, n.5, it appears to have been a concern for the dissenters in the lower court. 691 F.2d 213, 215 (Jolly, dissenting) ("I am concerned that it presents opportunities for ill-motivated defendants (or their attorneys for that matter) to set-up and sandbag the trial court into committing error.").

In the case of an inconsequential and unsolicited remark by standby counsel, the trial court may correct this type of conduct by instructing the jury to disregard the remark and directing standby counsel to refrain from making any further remarks. If the trial court fails to take these corrective measures, under appropriate circumstances, the reviewing court should have the power to determine that an isolated instance of unsolicited action by standby counsel did not deprive the defendant of the exercise of his right of self-representation if such action only incidentally interferred with the defendant's presentation of his defense.[4]

[4]The Petitioner's "sandbagging" arguments might further be criticized as being unduly skeptical of the motives of defendants and standby counsel. The sandbagging argument advanced here is analogous to arguing that there should be no habeas relief for claims of ineffective assistance of counsel because the availability of such a remedy will encourage lawyers to defend their clients poorly.

The more complicated question, perhaps, involves the problem presented by the second type of sandbagging when an accused either fails to recognize that one of his constitutional rights is being violated or intentionally decides to risk the trial result and, if it is unfavorable, to raise the constitutional violation on appeal.

The fundamental flaw in this argument is that it assumes the defendant will be able to raise a claim he overlooked or intentionally decided not to present at trial on a later appeal or petition for collateral relief. When an accused chooses to represent himself, he undertakes to serve as his own lawyer, or just as he would be bound by his lawyer's tactical or strategical decisions, so should the pro se defendant be bound by his trial decisions. This Court has held that when an accused, represented by an attorney, failed to object at trial to the admission of an arguably involuntary confession, the accused had waived his right to raise the constitutional argument on appeal, absent a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). See also *Engle v. Isaac*, 456 U.S. 107 (1982). Thus, the *Wainwright* waiver rule would bar a pro se defendant who failed to make a required objection from seeking habeas relief, absent a showing of cause and prejudice. Faced with an accused representing himself, the State should prosecute the case in exactly the same manner it would if the accused had a lawyer. If an accused's lawyer made a decision at trial to permit introduction into evidence of constitutionally infirm evidence, the State would certainly argue that the accused should be bound by that decision, even if the lawyer failed to object out of ignorance. The State should be able to avail itself of this same waiver argument in the case of a pro se defendant who fails to object to the violation of a constitutional right.

A judgment of conviction entered following a trial in which the defendant represented himself is, therefore, subject to no unique risks of reversal resulting from the defendant's exercise of the right of self-representation. The defendant will have precisely the same post-judgment remedies available to him as if he had been represented by counsel, no less and no more. An accused who thus waives assertion of a constitutional right is faced with the same hurdles to habeas relief as an accused with a bad lawyer or a lawyer who made the wrong decisions. Regardless of whether the defendant proceeds pro se or with counsel, the trial court has a duty to avoid and prevent a fundamentally unjust incarceration or a fundamental miscarriage of justice. *Engle v. Isaac*, 456 U.S. at 135. As the court noted in *Engle*, victims of a fundamental miscarriage of justice will meet the cause and prejudice standard; and this result would hold whether an accused had a lawyer or represented himself.

Closely related to Petitioner's sandbagging argument is Petitioner's claim that "the test adopted by the lower court establishes a rule which totally binds the hands of a trial judge confronted with a defendant exercising his *Faretta* right." (Petitioner's Brief at 12). This argument reflects the concern of the dissenters in the lower court that the rule "places judges in an impractical, inflexible strait-jacket." 691 F.2d at 215 (Jolly, dissenting). Respondent fails to see how a trial judge's hands are any more tied when dealing with a pro se defendant than with an accused's lawyer.

Petitioner goes on to claim that the rule requires the trial court to remain "mute" which may be detrimental to the interests of the state in ensuring fundamental fairness in criminal proceedings. (Petitioner's Brief at 14). Although the Fifth Circuit opinion clearly holds that the trial court should require standby counsel to remain mute unless consulted by

the accused, the opinion nowhere imposes such a restriction on the trial judge. Moreover, neither the Fifth Circuit opinion nor Respondent's reading of *Faretta* preclude a trial judge from suggesting that a defendant consult with standby counsel concerning a legal objection or trial matter about which the judge feels the defendant should be apprised.[5]

The fairness of the trial is built into the proceeding itself. The rules governing trial procedure are not abandoned when a defendant chooses to represent himself anymore than they are abandoned when a defendant has an incompetent lawyer. A fundamentally unjust incarceration or a fundamental miscarriage of justice can and should be cured whether a defen-

---

[5]The rule adopted by the Fifth Circuit is consistent with the role the American Bar Association contemplates for standby counsel, and the ABA Guidelines for the Administration of Criminal Justice (2d ed. 1980) provide some guidance in this area. Standard 6-3.7 provides in part that:

> When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion.

ABA Guidelines for the Administration of Criminal, Justice Special Functions of the Trial Judge, Standard 6-3.7 (2d ed. 1980). The Standards suggest that there is no inconsistency between a strictly limited role for standby counsel and the state's interest in a fair trial because the trial judge has an affirmative duty to protect the rights of a pro se defendant and to ensure a fair trial. Standard 6-3.6(b) provides that "when a litigant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial." *Id.* at 6-38. This rule surely does not mean that a trial judge should become the defendant's lawyer in place of the lawyer the accused refused. Instead, it simply recognizes that in proceedings involving a pro se defendant, just as in cases where a defendant employs counsel, the judge should be on the alert to avoid the commission of fundamental error that would jeopardize the finality of the trial result.

dant represents himself or whether he has a lawyer. The ultimate extension of the State's argument is that any trial with a pro se defendant is unfair; this argument requires overruling *Faretta*.

II.

IN THIS CASE, THE HARMLESS ERROR DOCTRINE IS NOT APPLICABLE TO THE DENIAL OF THE RIGHT OF SELF-REPRESENTATION.

A. Denials of the Right of Self-Representation Can Never Be Harmless.

When the Court first applied the harmless error doctrine to federal constitutional violations, it indicated that "there are some constitutional rights so basic to a fair trial that their infraction can never be harmless error," and referred to the right to counsel, the right to an impartial judge and the right not to have a coerced confession used against an accused as among those basic rights. *Chapman v. California*, 386 U.S. 18, 23, n.8 (1967). In subsequent cases applying the harmless error doctrine, the Court has continued to acknowledge the peculiar inapplicability of the harmless error doctrine to at least the three rights enumerated above. See, e.g., *United States v. Hasting*, 103 S. Ct. 1974, 1980 (1983).

Respondent contends that the right to self-representation is among those basic rights whose "infraction can never be treated as harmless error." The most obvious analog is to the right to counsel. At trial, a defendant is either represented by counsel or by himself. The right to represent oneself is thus parallel to the right to counsel and seemingly of equal digni-

ty. If a defendant waives his right to counsel, he does so to represent himself, the only other choice. If he is subsequently denied his right to represent himself, then he has been tried without counsel, either his own or that of a lawyer. As a matter of logic, therefore, the right to represent oneself would seem as basic to a fair trial as the right to counsel.[6]

Additionally, the denial of the right to assistance of counsel can never be harmless error because that error permeates the entire trial. In the normal case where a harmless error rule is applied, the reviewing court examines a particular aspect or moment of the trial and therefore can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. *Holloway v. Arkansas,* 435 U.S. 475, 490 (1978). By contrast, the reviewing court cannot reconstruct the effect a lawyer would have had on an entire trial with any hope of reasonable accuracy. Likewise, review of the denial of the right of self-representation requires the appellate court to review the entire record and is therefore subject to too much uncertainty "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser v. United States,* 315 U.S. 60, 76 (1942).

---

[6]It may also be true that the Court has decided this issue. In *Bittaker v. Enomoto,* 587 F.2d 400 (9th Cir. 1978), *cert. denied* 441 U.S. 913 (1978), the Ninth Circuit specifically refused to apply the harmless error doctrine to denials of the right of self-representation and affirmed the district court's grant of habeas relief on the grounds that the defendant was denied his right of self-representation. 587 F.2d at 402. This Court subsequently denied certiorari. 441 U.S. 913 (1978). See also *Young v. State,* 653 P.2d 153 (Nev. 1983). Justice Blackmun anticipated this issue in his dissent to *Faretta* when he asked, "May a violation of the right to self-representation ever be harmless error?" 422 U.S. at 852 (Blackmun, J. dissenting).

The right to self-representation also resists application of the harmless error doctrine because the right is not result oriented. *Chapman v. United States,* 553 F.2d 886, 891 (5th Cir. 1977).[7] *Faretta* itself acknowledges that as a practical matter assertion of the right to self-representation will, more often than not, result in a less skilled defense than if counsel guided the defense. 422 U.S. at 834. Moreover, the Sixth Amendment guarantees a defendant the right to conduct his own defense not necessarily because he will do a better job of it, but because "it is he who suffers the consequences if the defense fails," 422 U.S. at 820, and also because "the right to defend is personal." 422 U.S. at 834. The harmless error doctrine, however, focuses directly on

---

[7]As the *Chapman* court noted:

> The nature of the right to defend pro se renders the traditional harmless error doctrine peculiarly inapposite. Unlike other constitutional rights, the right to represent oneself is not "result-oriented." The normal operation of the harmless error doctrine is in cases where the challenged error concerns a right accorded the defendant to facilitate his defense or to insulate him from suspect evidence. *See United States v. Dougherty,* 154 U.S. App. D.C. 76, 473 F.2d 1113, 1127-28 (1972). By contrast, we recognize the defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action. . . .
>
> Accordingly, it is wholly irrelevant whether the result of Chapman's trial might have been different had the court deferred to his wish to represent himself. The only grounds appellee adduces for applying the harmless error doctrine pertain to result.

553 F.2d at 891-92.

As Respondent noted above in his analysis of Petitioner's reading of *Chapman's* 'genuine opportunity' to present his defense, the *Chapman* court does suggest another use of the harmless error test in this context.

result; the reviewing court asks if the evidence of guilt is so overwhelming that the court believes that the error was harmless beyond a reasonable doubt. *United States v. Hasting,* 103 S. Ct. 1974, 1981 (1983); *Milton v. Wainwright,* 407 U.S. 371, 378 (1972); *Harrington v. California,* 395 U.S. 250, 254 (1969); *Chapman v. California,* 386 U.S. at 24. It is clear then that the court assesses the weight of the evidence to determine the effect of the constitutional error on the jury's verdict. *Harrington v. California,* 395 U.S. at 254; *Connecticut v. Johnson,* 103 S. Ct. 969, 981-82 (1983) (Powell, J. dissenting). To guess at what evidence an accused would have admitted or objected to, to guess at what strategy the

---

The court said:

> There is, however, another sense of "prejudice" in this dictum from *Juelich* that illustrates a more appropriate use of the harmless error doctrine. The court noted that defendant was not prejudiced because he was permitted to question witnesses, argue his case, assign additional grounds for his §2255 motion, and otherwise directly participate in the proceedings, despite his request to defend pro se having been denied. *United States v. Juelich,* 342 F.2d at 33. A defendant afforded a genuine opportunity to help conduct his defense may be in no way harmed by the denial of his formal motion to defend pro se.

553 F.2d at 891, n.9.

A comparison of that hypothetical with the facts of this case demonstrates that the harmless error doctrine is inapposite here. Here, the court apparently granted the defendant the right to proceed pro se, but the subsequent conduct of standby counsel deprived Respondent of the right. There, the court formally denied the defendant the right to proceed pro se, but the defendant actually presented his own defense. Respondent asserts, however, that even in the *Chapman* hypothetical, the better analysis would be that no denial of the right occurred rather than that the denial was harmless error. Under Respondent's analysis, the Court should look to what the defendant did at trial; if he conducted his defense, he was not denied the right to proceed pro se, regardless of the trial court's formal ruling.

accused would have adopted if he had been permitted to represent himself, or, in other words, to guess the effect on the jury's verdict of denying an accused the right to conduct his own defense requires the reviewing court to engage in speculation beyond that required to weigh the effect of a violation of a result oriented right such as admission of improper evidence. The pertinent inquiry, however, is not would he have been convicted anyway, absent the error, (that question is irrelevant to the right of self-representation) but instead, was it the defense that the accused put forward that was considered and rejected? *United States v. Dougherty,* 473 F.2d 1113, 1128 (D.C. Cir. 1972).

The harmless error inquiry in a case involving the Sixth Amendment right to conduct one's own defense is the same inquiry used when determining initially if the accused was accorded the right. This results in considerable confusion when attempting to apply the doctrine in these cases and leads to the conclusion that the harmless error inquiry in these instances is essentially redundant.

Petitioner's wording of the second question presented by this case demonstrates this problem. The issue asks:

> Has the Fifth Circuit extended *Faretta v. California* by presuming prejudice where standby counsel assists a pro se defendant, even though the defendant had a genuine opportunity to represent himself?

(Petitioner's Brief at i).

In its argument on the first issue in this case, Petitioner contended that if a pro se defendant is given a genuine opportunity to present his defense, then he has not been denied his right to represent himself. Now Petitioner contends that when a defendant is given a genuine opportunity to conduct

his defense, any denial of his right was harmless error. Under Petitioner's analysis, the second question is superfluous because if defendant is given a genuine opportunity to conduct his defense, the harmless error question is never reached. The analysis is thus clearly tautologous.

Nonetheless, Petitioner asks the Court to use this circular reasoning in the analysis of the right of self-representation as an alternative to the Fifth Circuit's analysis:

> Petitioner urges this Court, instead, to adopt the 'genuine opportunity' inquiry as the standard of review *and* test for prejudice.

(Petitioner's Brief at 19) (emphasis added). Should the Court decide to adopt the "genuine opportunity" inquiry to determine if a defendant is deprived of his right to represent himself, Respondent contends the same question should not then be asked to determine if the denial was harmless error.

Respondent also contends that Petitioner has mischaracterizes the Fifth Circuit's holding as establishing "a presumption of prejudice where standby counsel assists a pro se defendant." Nowhere in the opinion can support for this reading be found. Petitioner states that the court "found that a presumption of prejudice would be applied where a standby attorneys (sic) is 'heard as well as seen'." (Petitioner's Brief at 17). Although no citation to the opinion accompanied this assertion,[8] repeated examination of the opinion revealed

[8]Petitioner's only citation, to *United States v. Frady*, 102 S. Ct. 1584 (1982), a case involving procedural waiver, is perhaps useful as a suggestion for the origin of Petitioner's "presumption of prejudice" language, but it does not appear to provide any aid in a harmless error analysis. In *Frady*, the Court held that to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show (1) "cause" excusing his double procedural default, and

only one mention of prejudice in this context. The Fifth Circuit noted that although "interjections made in the presence of the jury are inherently prejudicial, and are therefore subject to strict scrutiny, statements made outside their presence are not to be discounted." 681 F.2d at 274, n. 27. That observation only applies to one class of remarks — those made in the presence of the jury — rather than to *any* assistance from standby counsel and it further only subjects those remarks to strict scrutiny.

When this footnote is read in the context of the sentence to which it is attached, it becomes apparent that the Fifth Circuit contemplated an examination of the record as a whole to determine if the error was harmless beyond a reasonable doubt. The Fifth Circuit held that "[i]n order to make such a determination, an examination of the record as a whole is necessary; passages are to be examined in context, and evaluated in light of their affect on the total mix." *Id.* at 274.

As the Fifth Circuit's attempt to find a workable way to use the harmless error standard in this setting demonstrates, the real problem is that the harmless error standard may not be logically applicable to cases involving the right of self-representation. The Fifth Circuit apparently applied the doctrine in this case to avoid automatic reversals for an

---

(2) "actual prejudice" resulting from the errors of which he complains. 102 S. Ct. at 1594. Because the specific defect complained of in *Frady* involved a jury instruction, the Court held that the single instruction should not be judged in isolation, but must be viewed in the context of the overall charge. *Id.* at 1595. It is of course precisely because of the difficulty of evaluating the effect of the denial of the right of self-representation in a trial that it should be treated differently than a constitutional violation traceable to a single action or piece of evidence.

incidental violation of the right of self-representation. Additionally, the lower court sought to avoid sandbagging by unscrupulous counsel: "All that would be necessary to secure a new trial for a defendant whose conviction is a foregone conclusion would be for counsel to throw himself into the fray." 681 F.2d at 274.

Because application of the harmless error doctrine in these situations is inappropriate, Respondent suggests that the concerns expressed by the Fifth Circuit are more properly handled in the initial determination of whether the actions by standby counsel resulted in a denial of the exercise of the right. Thus, a minor outburst by overzealous counsel who momentarily forgets his standby role, can be cured by instruction or may not constitute a denial of the right because it only incidentally interfered with a defendant's conduct of his defense. The trial court should admonish, immediately, standby counsel who seeks to thwart the State, the court and the defendant by interjecting himself into the fray, and, if standby counsel continues his sabotage efforts, the trial court should use the many means at its disposal, including contempt, to control this conduct.[9]

B. The Denial of the Right of Self-Representation was not Harmless Error Under the Facts of this Case.

In the alternative, should the Court decide that a harmless error inquiry is proper, Respondent contends the inquiry

[9]As Chief Justice Burger noted in his dissent in *Faretta:* "Instances of overbearing or ineffective counsel can be dealt with without contriving broad constitutional rules of dubious validity." 422 U.S. at 837, n.1 (Burger, C. J., dissenting).

should focus on whether the accused actually presented his defense. This is the sense, as indicated above, in which the Fifth Circuit felt the harmless error standard might be applicable. *Chapman v. United States,* 553 F.2d 886, 891, n.9 (5th Cir. 1977). If the Court decides that the participation of standby counsel in this case denied Respondent the exercise of his Sixth Amendment right, the State should be required to prove beyond a reasonable doubt that the participation only incidentally interfered with Respondent's conduct of his defense. WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1142 (1969)defines incidental as "a. occurring merely by chance or without intention or calculation: occurring as a minor concomitant. . . ." Respondent's repeated requests that standby counsel refrain from initiating action on his own eliminate any possibility that standby counsel's actions were taken by chance. The constant pattern of interference also clearly indicate that standby counsel, regardless of motive, was acting intentionally. Under the facts of this case it stretches belief to argue that standby counsel's actions were mere accidental outbursts.

Respondent contends that standby counsel constantly, often rudely, interfered with Respondent's presentation of his defense. As the lower court noted, counsel's actions "destroyed Wiggins' own perception that he was conducting *his* defense." 681 F.2d at 275 (emphasis in original). Therefore, the denial of the right constituted more than an incidental interference with Respondent's presentation of his defense, and the denial of the right was not harmless error.

CONCLUSION

For these reasons, Respondent prays that this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit. In the alternative, if this Court should reverse the judgment of the Fifth Circuit, Respondent prays that this Court remand the case with instructions that the district court conduct an evidentiary hearing on Respondent's claims.

Respectfully submitted,

/s/ Craig Smyser

VINSON & ELKINS
3100 First City Tower, Suite 3123
Houston, Texas 77002
(713) 651-2730

Court-appointed Counsel for Respondent

Office-Supreme Court, U.S.
FILED
3
OCT 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-1135

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

W. J. ESTELLE, JR., DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

CARL EDWIN WIGGINS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT "PRO SE"

Carl Edwin Wiggins, Respondent
P. O. Box 32 - 241697
Huntsville, Texas 77340

CLB PUBLISHERS & LITHOGRAPHERS, INC. • (301) 933-5220

QUESTIONS PRESENTED

I. WHETHER, ON THE BASIS OF FACTS REFLECTED IN THE AVAILABLE RECORD, AND ALLEGATION OF UNDISPUTED FACTS ALLEGED IN THE ORIGINAL PLEADINGS, THE RESPONDENT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION ON ACCOUNT OF THE ACTIONS BY STAND-BY COUNSELS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Course of the Proceedings Below 1

B. Statement of the Facts 1-2

SUMMARY OF THE ARGUMENT 2-3

ARGUMENT 3-5

I. RESPONDENT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION ON ACCOUNT OF INTERFERENCE BY STAND-BY COUNSELS' ACTIONS 3

A. The Record Does Not Reflect The Entirety Of Interference By Stand-by Counsels 5-7

B. The Uncontrolled Actions Of Stand-by Counsels Provide Opportunity For "Sandbagging" Defense Efforts 7-8

CONCLUSION 8

TABLE OF AUTHORITIES

Case *Page*

Faretta v. California,
422 U.S. 806 (1975) 2

SUPPLEMENTAL BRIEF OF RESPONDENT "PRO SE"

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent, Carl Edwin Wiggins, respectfully submits his supplemental brief, pro se, in addition to the brief on the merits filed by Respondent's court appointed counsel.

STATEMENT OF THE CASE

A. Course Of The Proceedings Below.

Respondent agrees generally with Petitioner's description of the course of the proceedings below, except that part which states: "Although counsel was then appointed and timely filed an appellate brief, Respondent also filed a one hundred fifty page appellate brief." (Pet. brief at 3). The order of briefs filed in the direct appeal to the Texas Court of Criminal Appeals was the Respondent timely filed his one hundred fifty page brief *then* the court appointed counsel filed an appellate brief - and a Commissioner of the State Appeals Court treated counsel's brief as representation of the appeal and, in a single statement that the "Appellant's pro se brief is totally without merit," affirmed the conviction. 520 S.W. 2d 780 (Tex. Crim. App. 1975).

B. Statement Of The Facts

Respondent, in addition to the reasons cited by his court appointed counsel, does not agree with Petitioner's statement of facts to the extent it appears to attempt to create a

false impression that the Respondent had vacillated on the question of self-defense; does not provide the court with factual background concerning *other* court appointed attorneys who had been assigned to Respondent under the first two indictments.[1] Although the right to a self-defense does not require qualifying reasons under the principles of *Faretta v. California,* 422 U.S. 806 (1975). Respondent feels it is essential that the court be aware of his reasons to attempt to proceed without counsels going into his second trial. It was for this purpose Respondent requested his affidavit,[2] which was filed with the original petition in this Cause, be made a part of the JOINT APPENDIX. Please see A 57 thru A 85.

SUMMARY OF THE ARGUMENT

Respondent respectfully contends he was deprived of his fundamental right to defend himself without counsel because of the incessant interference by two stand-by counsels. Not one, but two counsels, were forced upon Respondent in his trial, who actively interfered with Respondent's efforts to conduct his defense. Even though the unanimous panel of the United States Court of Appeals found sufficient facts reflected in the available trial record and determined the Respondent was, in fact, denied his constitutional right of self-representation by unwanted interference of court appointed stand-by counsel, not all the activities by these two

[1]Over a period of 13 months Respondent was indicted a total of four (4) times; each alleging the same robbery. Petitioner's term, "aggravated," was never used in the accusation.

[2]The affidavit is simply a spontaneous utterance by Respondent which describes the conduct of all the attorneys in and out of the courtroom.

stand-by counsels are reflected in the available trial record. If the court is to consider the "Harmless Error" Rule, and reaches a point in its deliberations which may possibly overrule the Panel's finding that such activities were not harmless, then *all* the activities of these two stand-by counsels should be considered and evaluated in terms of quantity and/or quality, for determination of the apparent effect on the trial of this case. On the other hand, if the court considered the Petitioner's suggested "Genuine Opportunity" rule, then only the isolated efforts by the pro se defendant, without regard to the activities of the two stand-by counsels, would need review. Establishment of a "Genuine Opportunity" rule in this case, within the framework advocated by the Petitioner, would become something of the nature of a third party in a trial permitted to "do or not to do anything" they wished, with a trial court acting only "if some problem or situation arises." Finally, if its conceivable for unscrupulous counsels to "sandbag" the prosecution, it is even more conceivable for unscrupulous counsels, in the absence of restraint & guidelines imposed by the trial court, to "sandbag" the defense with a significant degree of certainty for mistrial or conviction.

ARGUMENT

I.

RESPONDENT WAS DEPRIVED OF HIS RIGHT TO SELF-REPRESENTATION ON ACCOUNT OF INTERFERENCE BY STAND-BY COUNSELS' ACTIONS.

As indicated by the available record, stand-by counsels continually interrupted the proceedings, made objections,

ordered Respondent about, cursed, and even disobeyed the trial court's specific instructions. Respondent contends these actions by the stand-by counsels deprived Respondent of his asserted right to defend himself without counsels as found by the Panel in the court below. However, the available record does not reflect the entirety of stand-by counsels' actions occuring during the trial of this case. During state appeal process Respondent was denied records which he had specifically requested in his timely designation for matters to be included in the record on appeal. Among these missing records included a transcription of the recorded testimony given by Respondent during pretrial hearings on the 7th day of December, 1972 and January 11, 1973, describing the conduct of the court appointed attorneys assigned to him at those times. Subsequently, unable to obtain these records, Respondent made an affidavit for the purpose of describing the adverse conduct of all the attorneys; matters of which Respondent believed he could prove up in an evidentiary hearing. This affidavit was filed with the original 2254 petition leading to this court following the granting of the writ by Court of Appeals. The Court of Appeals, on the basis of what was reflected in the available record, granted the writ and, apparently, found no good reason to address the undisputed allegations tendered by the Respondent in his affidavit. But these are still facts relating directly to the issue before this court. Also, where the Petitioner's brief states Respondent "requested the appointment of counsel." (Brief pages 3, 2nd para., 4, 2nd paragraph), on three occasions, the reader could easily get the impression Respondent vaccilated on the question of self-representation. These requests for assistance of counsel are reproduced in the JOINT APPENDIX at A-54, 55 & 56. And the undisputed explanations for these specific requests are also reproduced in the JOINT APPENDIX at

A-76, 77 & 84. Therefore, if the court is to give any weight to Petitioner's statement that Respondent "requested assistance of counsel," the matter should be viewed in the full context.

A. The Record Does Not Reflect The Entirety Of Interference By Stand-by Counsels

Following are examples of active interference by stand-by counsels that are not necessarily reflected in the trial record, described in Respondent's affidavit and reproduced in the JOINT APPENDIX at:

A-80, "Every time I started to cross-examine a prosecuting witness, Mr. Graham would punch me and start whispering in my ear..... most of what he said was nothing but gibberish. . . . . "

"Judge Woods called a recess about every 20 or 30 minutes. During these periods Mr. Graham would walk around my chair back and forth, cussing me. . . "

A-81, "I knew, beyond any doubt, that he was working for the Prosecution. . ."

A-82, "But Mr. Samples argued against me that it should remain in the charge. Judge Woods changed his ruling and went with Mr. Samples. . . ."

"Mr. Graham got up and started his closing arguments to the jury, the first thing he said was something like: Ladies and Gentlemen, this 60 year old man over here. . . . and motioned toward me. . . ."

A-83, "Just as I sat down, Mr. Samples began alapping me

on the back, saying loudly: Good Show! Good Show! . . . . . .it's for certain the jurors would remember this clearly."

Obviously, when stand-by counsels are seated closely to a Defendant who is attempting to conduct a pro se defense, the whispering and punching one's back cannot be recorded. The trial record reflects only one of Respondent's complaints about the whispering by the stand-by counsels:

JOINT APPENDIX, A-35, beginning last paragraph into next page:

DEFENDANT: "Well, your honor, at times when the defendant is listening to the testimony and or questioning, cross-examining or examining a witness, now, will you ask counsels to wait until the testimony is over or hold up the proceedings for a moment, because the defendant can't listen to their voice and at the same time listen to the testimony."

THE COURT: "Alright. You can hold up your hand and I will stop the proceedings."

Although the record doesn't appear to place this in the context of Respondent's complaints about the constant whispering by stand-by counsel Graham, the following statement by Mr. Graham was on account of such complaints:

JOINT APPENDIX, A-31, first para.:

MR. GRAHAM: "I will sit third chair from now on. I will move back one notch."

After Mr. Graham "moved back one notch," Mr. Samples, the other stand-by counsel, moved directly behind Respondent. A part of Respondent's affidavit, reproduced in the

JOINT APPENDIX, at A-80, about the middle of the second paragraph, states:

> "Then Mr. Samples moved directly behind me and started doing the same thing. At one point I got so sick of this, I grabbed my chair and scooted it out and away from the table and the lawyers."

Respondent will not pretend to cite authorities and argue the law on one's right to self-representation. The appropriate law and logic involved in this case has been more than adequately briefed by Respondent's court appointed attorney. The only purpose for this pro se, supplemental, brief is to present the court with these additional relevant facts.

B. The Uncontrolled Actions Of Stand-by Counsels Provide Opportunity For "Sandbagging" Defense Efforts.

Up to this point there has been discussion about the possibility that the application of the rule established by the Fifth Circuit Court of Appeals, that stand-by counsels are to be "seen and not heard," may provide opportunity for unscrupulous counsels to "sandbag" the prosecution. Respondent contends that anytime two stand-by counsels are forced upon a defendant who is attempting to conduct his own defense, without counsels, the opportunity these counsels have, if they are unscrupulous, for undermining, or "sandbagging," the defense is even greater than the possibility of their "sandbagging" the prosecution - unless their actions are controlled by the trial court. Since November, 1972, Respondent has consistently claimed that the court appointed attorneys assigned to him were deliberately acting to undermine his defense. . . "and were part of the prosecution." Please see Respondent's

affidavit reproduced in the JOINT APPENDIX at A-57, para. 3, A-65, para. 2, A-67, last para., and A-68, para. 2, for examples. Whether the court assigns any credibility to these allegations or not, they still remain undisputed. The point is, believable or not, it is conceivable that the uncontrolled actions of stand-by counsels can undermine, or "sandbag," a defense with a significant degree of certainty for mistrial or conviction. A citizen-defendant who asserts his or her right for self-representation is entitled to the court's protection from this.

CONCLUSION

Respondent prays that the judgment of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully Submitted,

Carl Edwin Wiggins, Pro Se
Box 32 - 241697
Huntersville, TX 77340

(THIS PAGE INTENTIONALLY LEFT BLANK)

No. 82-1135-CFH
Status: GRANTED

Docketed:
January 6, 1983

Title: Dan V. McKaskle, Acting Director, Texas Department of Corrections, Petitioner
v.
Carl Edwin Wiggins

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Benitez,Leslie A.

Counsel for respondent: Smyser,Craig, Wiggins,Carl Edwin

Entry	Date	Note	Proceedings and Orders
1	Jan 6 1983	G	Petition for writ of certiorari filed.
2	Jan 27 1983	G	Motion of respondent for leave to proceed in forma pauperis filed.
3	Jan 27 1983		Brief of respondent Carl Edwin Wiggins in opposition filed.
4	Feb 2 1983		DISTRIBUTED. February 18, 1983
8	Feb 8 1983		Brief of court appointed counsel in opposition filed.
9	Feb 22 1983		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Feb 22 1983		Petition GRANTED.
			**********
11	Mar 3 1983		Record filed.
12	Mar 3 1983		Certified original record & C.A. proceedings, 2 volumes, received.
13	Mar 3 1983	G	Motion of respondent for appointment of counsel filed.
14	Mar 11 1983		DISTRIBUTED. March 18, 1983. (Above motion)
17	Mar 21 1983		Motion for appointment of counsel GRANTED and it is ordered that Craig Smyser, Esquire, of Houston, Texas, is appointed to serve as counsel for the of respondent in this case. In all other respects the motion is denied.
19	Apr 1 1983		Order extending time to file brief of petitioner on the merits until April 29, 1983.
21	May 2 1983		Brief of petitioner filed.
22	May 5 1983		Joint appendix filed.
24	May 25 1983		Order extending time to file brief of respondent on the merits until June 27, 1983.
25	Jun 22 1983		Order further extending time to file brief of respondent on the merits until July 6, 1983.
26	Jul 6 1983	X	Brief of respondent filed.
27	Aug 2 1983		CIRCULATED.
28	Aug 8 1983	G	Motion of respondent pro se for leave to file supplemental brief on the merits filed.
29	Aug 17 1983		DISTRIBUTED. September 26, 1983. (Above motion)
30	Sep 21 1983		SET FOR ARGUMENT. Wednesday, November 9, 1983. (4th case) (1 hour)
32	Oct 3 1983		Motion of respondent pro se for leave to file supplemental brief on the merits GRANTED.
33	Oct 3 1983	X	Supplemental brief of respondent Carl Edwin Wiggins filed.
34	Nov 9 1983		ARGUED.